

89-283

(2)

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

Supreme Court, U.S.

FILED

JUL 17 1989

JOSEPH F. SPANIOLO,
CLERK

AMY TRAVEL §
SERVICES, INC. et al. §

Petitioners §

v. §

NO. _____

FEDERAL TRADE §
COMMISSION §

Respondent §

Appeal from the United States
Court of Appeals
for the Seventh Circuit

APPENDIX

Robert S. Bennett
Ben C. Brooks
H. Victor Thomas
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AMY TRAVEL SERVICE, INC.
RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.
MARKETING, INC., THOMAS P.
McCANN, II, JAMES F. WEILAND

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APPENDIX



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EXHIBIT 1



IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE	§	
COMMISSION	§	
	§	
Plaintiff	§	
	§	
vs.	§	NO. 87 C 6776
	§	
AMY TRAVEL	§	
SERVICE, INC.	§	
INC., RESORT	§	
PERFORMANCE, INC.,	§	
RESORT TELE-	§	
MARKETING INC.,	§	
THOMAS P. MCCANN,	§	
III, AND	§	
JAMES F. WEILAND	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AFTER TRIAL

Joan H. Lefkow, Magistrate:

This case is before the court on the complaint of the Federal Trade Commission ("Commission") alleging that defendants have violated section 5(a) of



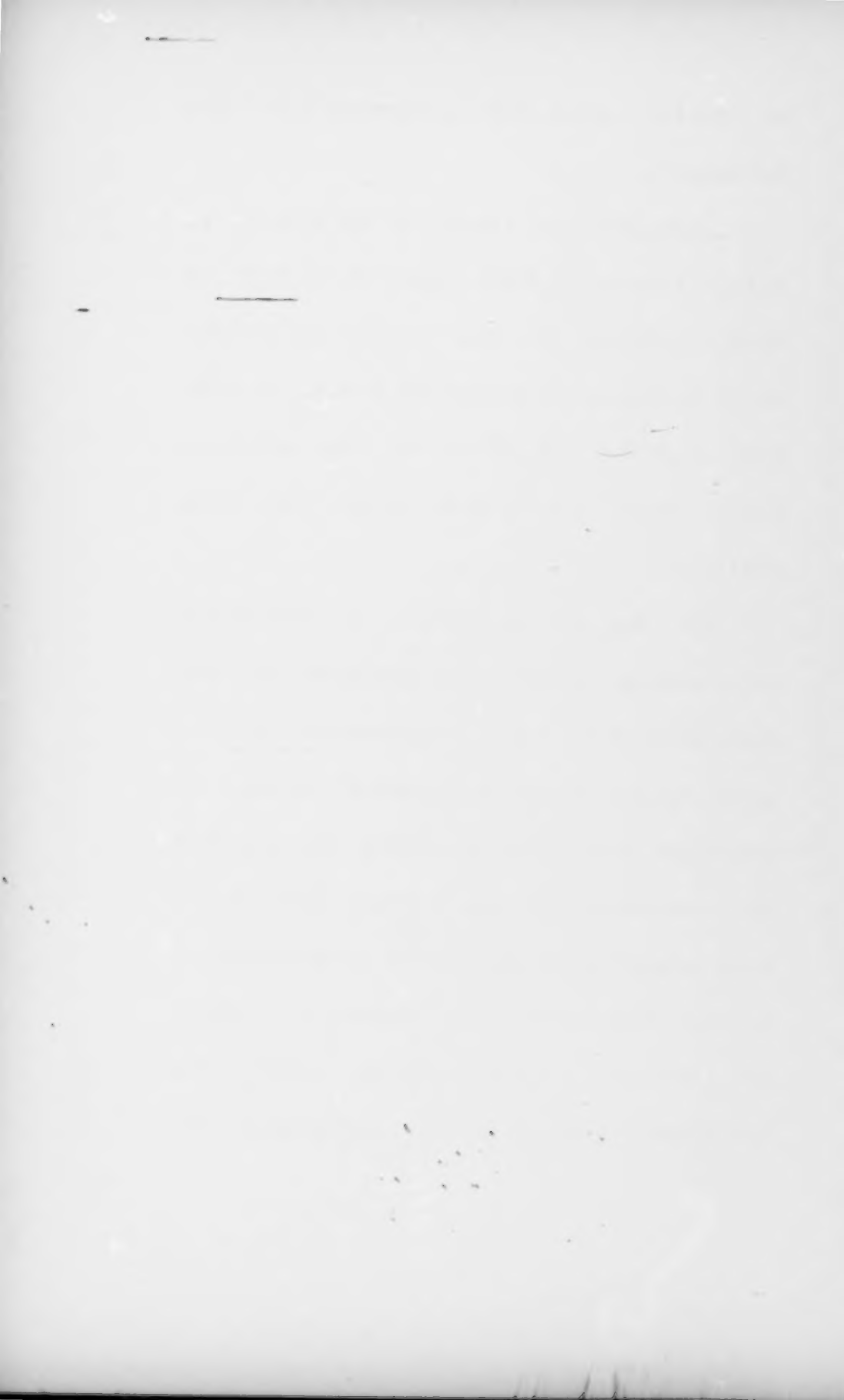
the Federal Trade Commission Act ("the Act"), 15 U.S.C. § 45(a), which prohibits unfair and deceptive practices in commerce. The Commission alleges that defendants Resort Telemarketing, Inc. ("RTI"), Resort Performance, Inc. ("RPI"), Amy Travel, Inc. ("Amy"), James Weiland and Thomas McCann, controlling principals of the defendant corporations, engaged in deceptive and unfair practices prohibited under section 5(a) in connection with their sale of contracts for vacation services, called "Vacation Passports." The Commission seeks a permanent injunction under section 13(b) of the Act, 15 U.S.C. §53(b), rescission of contracts entered into as a result of the allegedly unlawful trade practices and restitution



of monies paid by consumers to the defendants.

Jurisdiction rests on 28 U.S.C. §§ 1331, 1337(a), 1345 and 15 U.S.C. § 53(b). Venue is uncontested as proper in this district under 28 U.S.C. § 1391 and 15 U.S.C. § 53(b) on the apparent basis that the claim arose in this district.

On August 3, 1987, a temporary restraining order was entered by the Honorable Harry D. Leinenweber, which, inter alia, froze defendants' assets to preserve funds for possible restitution to consumers and restrained defendants from engaging in practices complained of in the complaint. On August 17, 1987, the temporary restraining order was "extended generally" by agreement and



the motion for preliminary injunction was consolidated with the trial on the merits. Thereafter, the parties consented to trial before a United States Magistrate under 28 U.S.C. §636(c). The matter was tried before the court December 10-17, 1987.

The complaint alleges four unfair or deceptive acts or practices committed by the defendants. Count I alleges that the defendants represented to consumers that purchasers of Vacation Passports were entitled to fully paid vacations to Hawaii and other destinations, including roundtrip airfare and hotel lodging for eight days and seven nights for a purchase price ranging from \$289.90 to \$349.90, that this representation was false, and that in fact purchasers were



required to pay substantial sums in order to obtain their vacations. The complaint alleges that defendants' false representations were a deceptive practice committed in violation of Section 5(a).

Count II alleges that defendants represented to consumers who purchased Vacation Passports that the only additional cost of the vacation package was "one standard, all year full economy (Y-class) airfare." It alleges the representation was false in that a Y-class airfare is not an economy airfare but rather is the highest price coach airfare and significantly more expensive than the lowest possible airfare generally available to the public. By couching the additional



costs in terms of "one standard, all year full economy (Y-class) airfare," defendants failed to disclose the full cost of what the consumer was buying. This was especially deceptive and unfair in light of representations made contemporaneously that consumers were buying a "[w]onderful vacation at . . . a low price", [s]pecial price vacation," "[w]onderful vacation package at such a low price", and that a "limited number" of vouchers were available "at this price." Nondisclosure of price under these circumstances, the complaint alleges, is a deceptive trade practice.

Count III alleges that defendants represented to consumers that consumers must provide defendants with their credit card numbers for the sole purpose



of verifying their eligibility to purchase a Vacation Passport, and that this representation was false because defendants obtained the numbers in order to bill charges for vacation passports to consumer credit card accounts. The complaint alleges that the false representation that the defendants wanted the credit card numbers for purposes of verification of eligibility was a deceptive trade practice.

Count IV alleges that defendants have billed charges for Vacation Passports to consumer's credit card accounts after being told by consumers not to bill their accounts; after defendants represented to consumers that they needed the number solely to verify their eligibility to purchase a Vacation

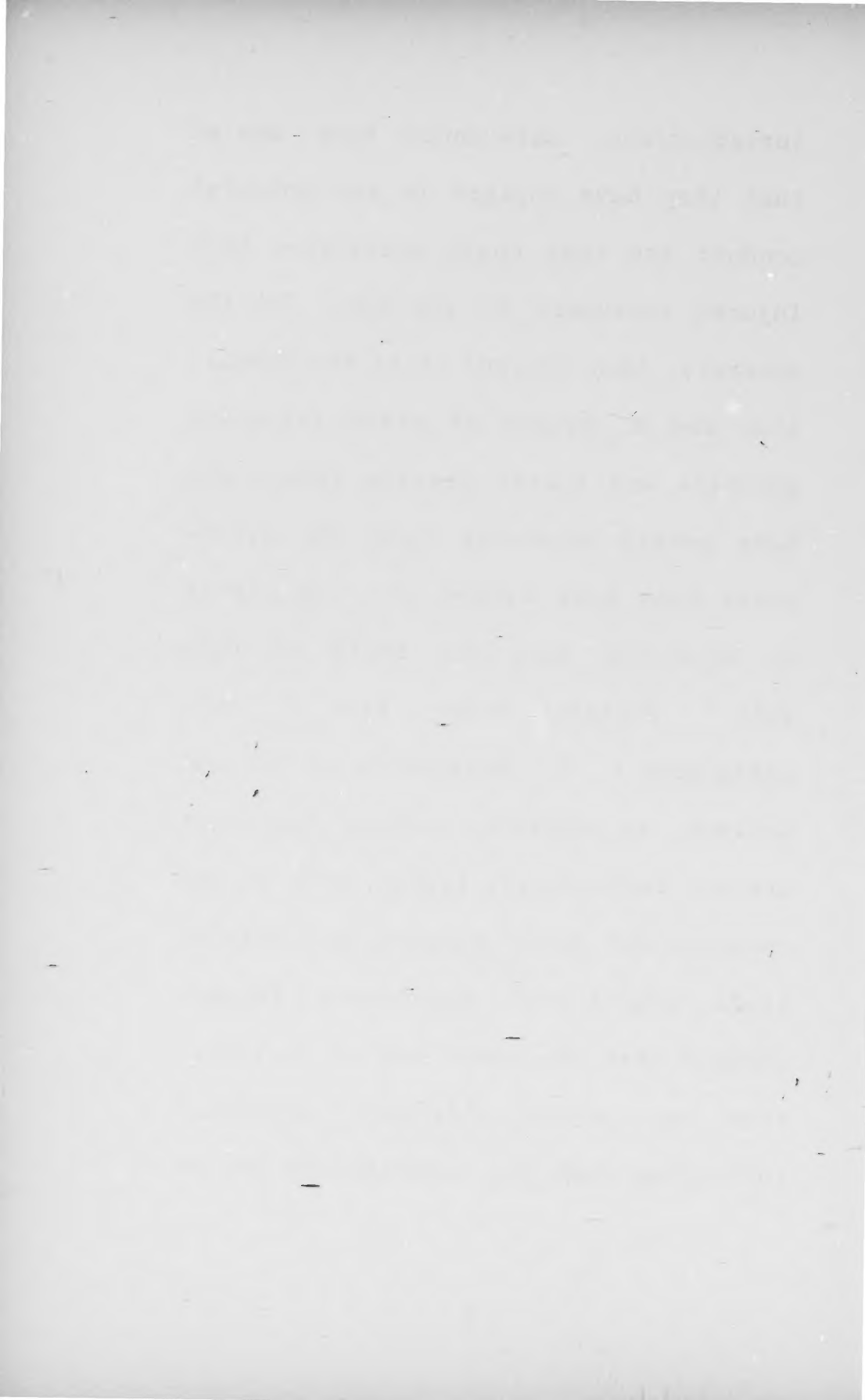


Passport; or after telling consumers that their credit card numbers would not be billed. The complaint alleges that defendants' practice of billing consumer credit card accounts without the consumers' express knowledge or consent was an unfair act or practice under section 5(a) of the Act. The complaint further alleges that the misrepresentations and nondisclosures were likely to mislead consumers and to result in injury to them and that defendants have in fact suffered substantial injury as a result of their reliance on defendants' representations, including payment of money to defendants for the Vacation Passports.

Despite injunctions and consent decrees having been entered in several



jurisdictions, defendants have denied that they have engaged in any unlawful conduct and that their activities have injured consumers in any way. To the contrary, they contend it is the Commission and a variety of state attorneys generals and Secret Service agents who have seized documents from the defendants that have caused the "occurrence or condition made the basis of this suit." Pretrial Order, Part C, subparagraphs F, G. Defendants McCann and Weiland, in addition, contend that they are not individually liable, even if the corporations have engaged in unlawful trade practices. Defendants further contend that the court has no jurisdiction to enjoin "defunct parties," indicating that ~~the~~ corporations are no



longer doing business. Id., subparagraph

A.

FINDINGS OF FACT

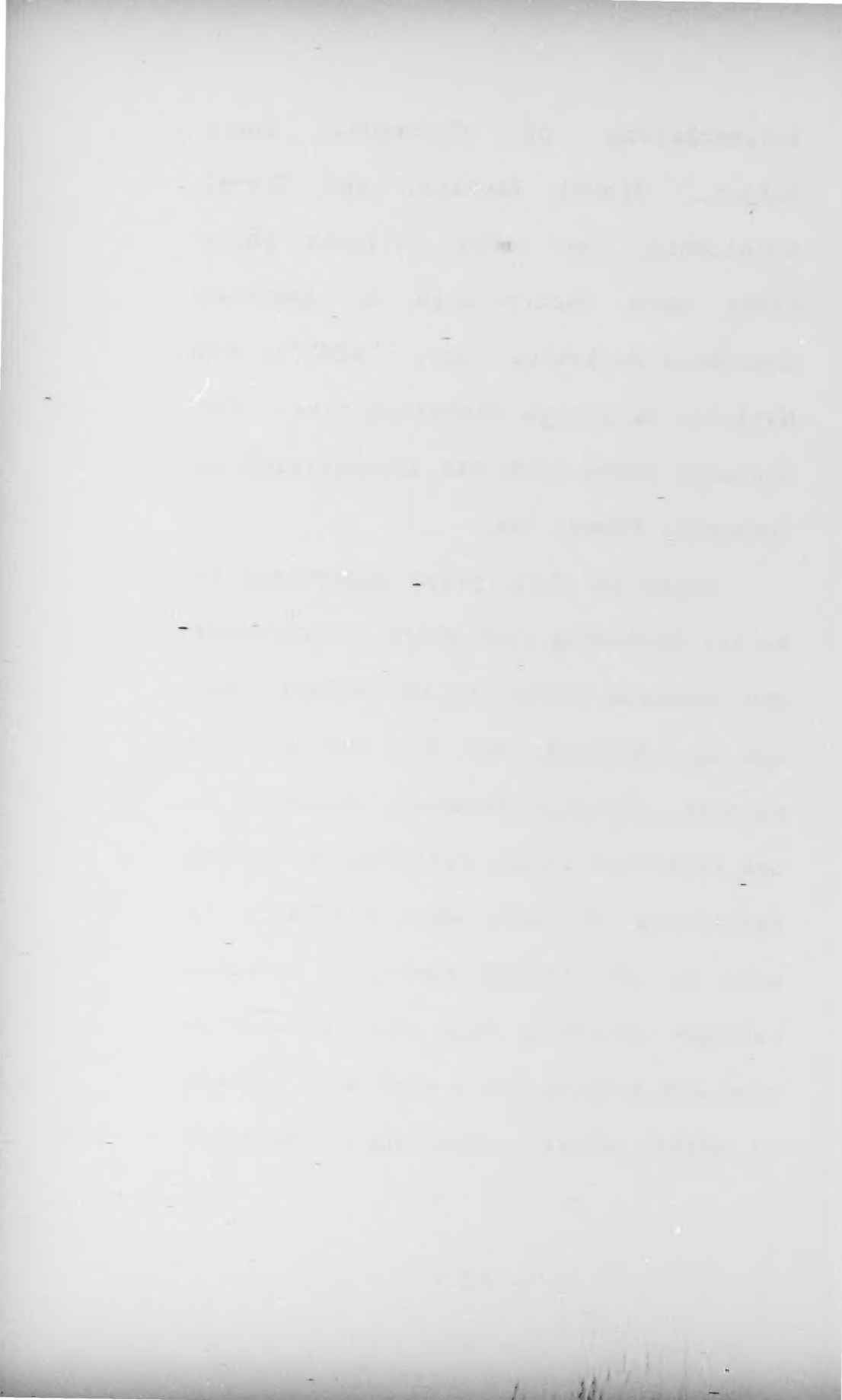
Based on the testimony received, the exhibits and depositions admitted into evidence and the stipulations of the parties, the court, having weighed the credibility of the witnesses, enters the following findings of fact:

In September, 1985, defendants Weiland and McCann incorporated RPI, an Illinois corporation, for the purpose of marketing vacation certificates. RPI is located in Naperville, Illinois. In June, 1986 defendants McCann and Weiland and two other individuals incorporated RTI, an Indiana corporation, and opened a "telemarketing" sales room in Indianapolis, Indiana, to sell "Vacation

Passports" at retail over the telephone. Within a few months, they opened additional phone sales rooms, two in Texas, three in Colorado, two in Illinois, and one in Kentucky. These corporations were wholly-owned subsidiaries of RTI. All the corporations were managed by McCann and Weiland and all operated as a single entity in all material respects. RPI held payroll accounts for the employees of some or all of the other corporations. RTI handled the billing to customer accounts resulting from the subsidiary corporations sales. The Houston phone rooms were incorporated as Resort Telemarketing of Texas, Inc. ("RTI Texas"), and Texas Communications and Travel, Inc. ("TCT"). The Colorado phone rooms were incorporated as Resort

Telemarketing of Colorado, Inc., National Travel Brokers, and Travel Excellence, Inc. The Illinois phone rooms were incorporated as American Consumers Marketing, Inc. ("ACMI"), and National Consumers Marketing, Inc. The Kentucky phone room was incorporated as Consumers Power, Inc.

Based on their prior experience in sales, including time-share condominiums and vacation travel sales, McCann, then age 25, Weiland, age 27, and a third partner, Cecilia Pradhan, intended to use telephone to use telephone marketing techniques to sell what basically is sold by any travel agent, a vacation package including both air transportation and lodging for a week at a variety of resort areas. Adapting a "Vacation



Passport" that they had seen or used in prior employment, McCann and Weiland put together written materials which they called their Vacation Passport. The passport consisted of two pages of promotional material including a description of the "product" or vacation package that defendants were selling.

Several portions of the passport are involved in this controversy, so it will be stated in some detail. The passport identified RPI and Amy as the presenters. On an inside flap it listed nine resort destinations and stated,

This Passport entitles the adult holder(s) to receive two round-trip air tickets plus lodging for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare. Single adult travelers are entitled to the identical benefits

for 50 per cent of the Y-class fare.

To the right of this material appeared "reservation procedures" and "cancellations." "Reservation procedures" included the purchaser's obligation to contact Amy to make vacation reservations. On the reverse of the passport appeared the caption, "Amy Travel Service Inc.," and a form permitting the purchaser to select three alternative departure dates and a destination. Finally, the passport contained "tour terms and conditions" and "our guarantee to you." This paragraph included the following language:

...Some departure points may require the purchase of first-class airfare rather than "Y" class airfare; however, AMY TRAVEL SERVICE INC. guarantees the lowest price of your itinerary or will

pay you triple the difference in cash. AMY TRAVEL SERVICE INC. reserves the right to select and/or substitute hotels due to availability of our special packages...

After a sale was made over the phone, defendants mailed the passport to the purchaser. Included with each passport was a Purchaser's Acknowledgement Agreement ("PAA"). The PAA varied somewhat from time to time and among the different corporations. One of the PAA's used at TCT is illustrative:

PURCHASER'S ACKNOWLEDGEMENT
AGREEMENT

1. With your credit card purchase of \$329.90 of the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the

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NEW YORK 17, N. Y.

voucher. In other words, for the cost of the one airfare, the travel agency will provide both airline tickets and 8 days and 7 nights lodging for two people, plus they do all the work. You have eight locations to choose from. They are... ACAPULCO, JAMAICA, FLORIDA, BAHAMAS, HAWAII, LAS VEGAS, COLORADO OR LONDON.

2. The travel agency's guarantee to you is: They guarantee you the lowest cost of your vacation itinerary, including both airfares and lodging for two people or they will pay you triple the difference in cash if you can find the same lodging as we offer and the same airfares for a lesser amount.
3. Your vacation passport is non-cancellable nor redeemable for cash. However, it may be transferred to another adult of your choice at no penalty. They must understand, however, that in order to take advantage of the program they must pay the equivalent of one round trip, standard, all year, full economy (Y-class) airfare.

4. Your vacation passport will be processed and mailed to you within the next few days. The travel agency will need to receive your completed travel request form at least 45 days in advance of your requested departure date. The voucher is good through _____ 19__.
5. Your point of departure will be from any major airport serving all major cities in the continental United States.
6. You have agreed to furnish Texas Communication & Travel, Inc. with the names of three referrals either before or after you have taken your vacation. Your referrals are under no obligation to purchase.
7. Do you fully understand everything I have just read to you?????
DATE: _____ REP: _____
MANAGER: _____

Plaintiff's Exhibit 7-2.

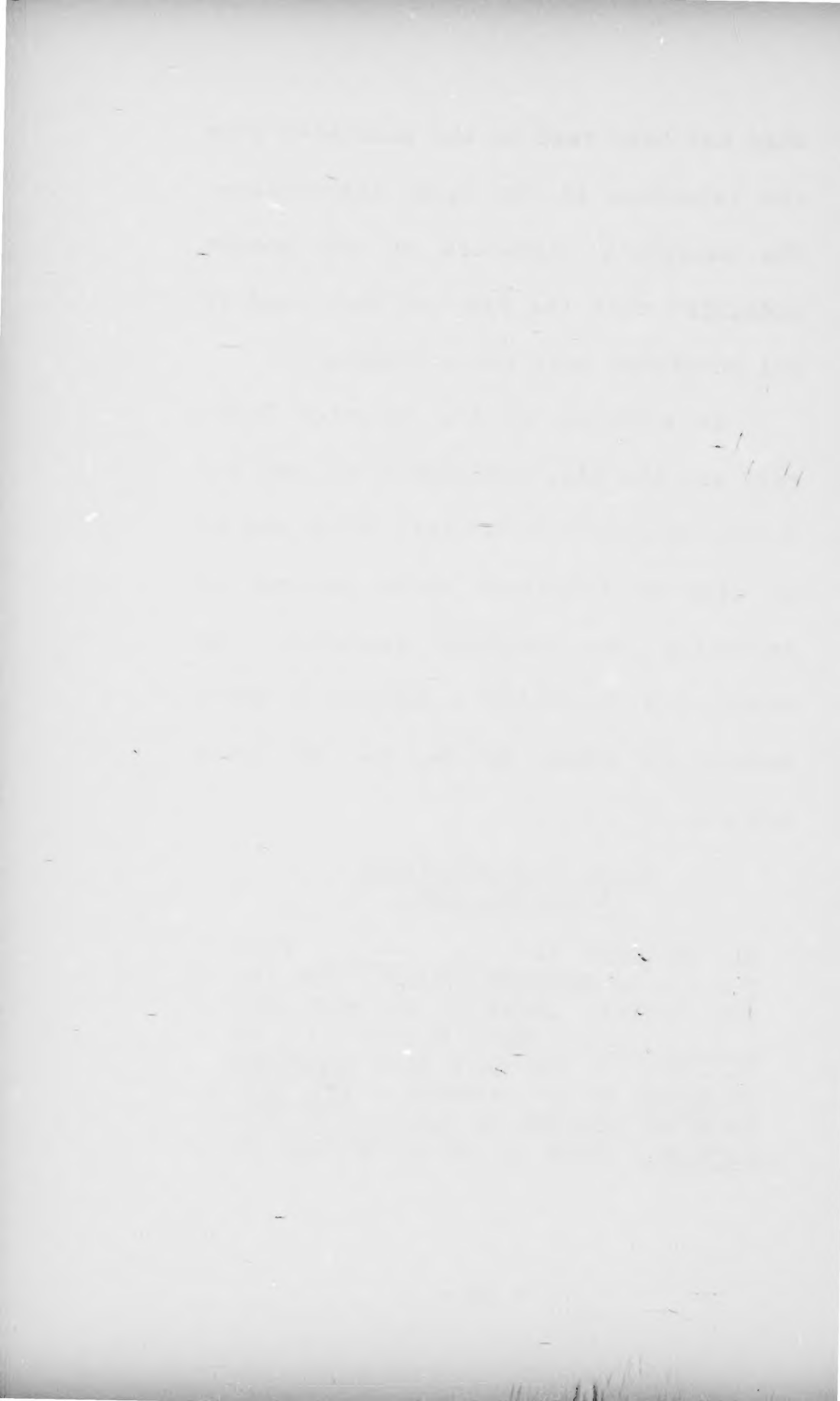
As indicated by paragraph 7, the PAA purported to be a written copy of

what had been read to the purchaser over the telephone in the sales transaction. The manager's signature at the bottom indicated that the PAA had been read to the purchaser over the telephone.

In addition to the Vacation Passport and the PAA, defendants Weiland and McCann developed a "script" which was to be used by telephone sales persons in marketing the Vacation Passport. An example is Plaintiff's Exhibit 7 which defendants admit to be one of their scripts.

TEXAS COMMUNICATIONS
& TRAVEL, INC.

HI, MY NAME IS _____ WITH
T.C.&T. OF HOUSTON, TEXAS. HOW ARE
YOU TODAY? GREAT... MR./MRS./MS.
_____, THE REASON I AM
CALLING, IS YOU HAVE BEEN COMPUTER
SELECTED TO BE OFFERED A SPECIAL,
VACATION VOUCHER TO HAWAII FOR ONLY
\$329.90. THIS IS BEING OFFERED TO



LESS THAN 1% OF ALL THE CREDIT CARD
HOLDERS IN THE U.S.

AT THAT PRICE, I'M SURE YOU'D LIKE
TO GO, HOWEVER, I DO HAVE TO ASK
SOME QUALIFYING ?S FIRST. PROBABLY
QUESTIONS: (1) WHY SO CHEAP? (2)
WHAT'S THE CATCH (3) WHAT DO I DO
TO QUALIFY?

(REGARDLESS OF QUESTIONS, THE
ANSWER IS:)

FIRST, MR./MRS./MS. _____, LET'S SEE
IF YOU QUALIFY.

1. YOU ARE 21 OR OVER, AREN'T
YOU?
2. YOU ARE STILL A MASTERCARD OR
VISA CARD HOLDER, AREN'T YOU?
3. YOU DO PLAN TO TAKE A VACATION
WITHIN THE NEXT 12 MONTHS,
DON'T YOU?
4. WHEN YOU TAKE YOUR VACATION,
IF THE ACCOMMODATIONS WERE
COMPLETELY PAID FOR, WOULD YOU
TAKE SOMEONE WITH YOU?
5. AFTER YOU HAVE ENJOYED YOUR
VACATION, WOULD YOU SEND US
THE NAMES OF # FRIENDS WHO
WOULD LIKE TO TAKE A SIMILAR
VACATION, IF THEY WERE UNDER
NO OBLIGATION?

I'M GLAD YOU SAID (YES) TO THOSE
QUALIFICATIONS ...NOW I CAN TELL
YOU WHAT WE CAN DO FOR YOU, AND WHY

WE CAN OFFER YOU THIS WONDERFUL
VACATION PACKAGE AT SUCH A LOW
PRICE.

WE HAVE TESTED THE FEASIBILITY OF
TELEPHONE MARKETING, AND THE
RESULTS HAVE BEEN SO GREAT THAT WE
HAVE BEEN ALLOWED TO CONTINUE TO
OFFER THIS SPECIAL VACATION PACKAGE
TO PREFERRED PEOPLE LIKE YOU.

MR./MRS.¹ MS. _____, FOR ONLY
\$329.90¹ YOU WILL RECEIVE YOUR
VACATION VOUCHER, WHICH ENTITLES
YOU TO A FULLY PAID VACATION FOR 8
DAYS AND 7 NIGHTS FOR (2) PEOPLE AT
A BEAUTIFUL RESORT HOTEL, PLUS 2
ROUND TRIP AIRFARES, FOR A COST NOT
TO EXCEED (1) UNRESTRICTED ECONOMY
AIRFARE.

BY USING YOUR MASTERCARD OR VISA
YOU WILL RECEIVE YOUR VACATION
VOUCHER WITHIN 7 TO 10 DAYS, OR
SOONER.

AS A PREFERRED CUSTOMER... WOULD
YOU RATHER USE MASTERCARD OR
VISA...

(SHUT UP.....) ,

¹Prices varied from \$289.90 to as
high as \$349.90.

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY
1215 EAST 58TH STREET
CHICAGO, ILL. 60637
TEL. 733-4331

THE UNIVERSITY OF CHICAGO
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1215 EAST 58TH STREET
CHICAGO, ILL. 60637
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TEL. 733-4331

(WHEN YOU HAVE INTEREST, READ THIS RECAP) WHAT YOU ARE PURCHASING TODAY WITH YOUR CREDIT CARD IS A VACATION PASSPORT FOR \$329.90. THIS PASSPORT ENTITLES YOU TO 2 ROUND TRIP AIR TICKETS, PLUS LODGING FOR 8 DAYS AND 7 NIGHTS FOR 2 PEOPLE AT A RESORT HOTEL, FOR A COST NOT TO EXCEED 1 UNRESTRICTED ROUND TRIP, (Y-CLASS) FULL ECONOMY AIR-FARE.

CLOSING: WHAT IS THE EXPIRATION DATE? HOW DOES THAT # READ? OK, WHILE I'M GETTING YOUR AUTHORIZATION #, I WOULD LIKE TO HAVE MY MANAGER VERIFY EVERYTHING I HAVE SAID TO YOU.

9714 OLD KATY ROAD, SUITE 212,
HOUSTON, TEXAS 77055
12/8/86

After the script was read, the salesperson gave the phone to his or her supervisor (the T-O, or takeover), who read the PAA to the customer. Beginning in the fall of 1986, in response to consumer complaints, various state and federal law enforcement authorities

began investigating defendants' operations. In February 1987, the Attorney General of the State of Texas executed a search warrant on the premises of RTI Texas and TCT. As a result of the search, the Attorney General of Texas came into possession of a variety of typed and handwritten scripts that had been located on the desks of telephone sales persons. These were turned over to the Commission for use in this case. Many of the typewritten scripts contained basically the same format as Plaintiff's Exhibit 7, and the evidence supports the inference that these emanated from McCann or his managing agents. Plaintiff's Exhibit 2, for example, starts out:



Hi. My name is _____, I'm calling you with T.C.&T., I'm calling from Texas. This is not a sales call so please relax. The reason I am calling Mr./Mrs./Ms. _____, is this, you have been computer selected through a major credit card company to be offered a fully paid vacation to Hawaii, for only \$289.90. *** We are testing the feasibility of telephone marketing for an INTERNATIONAL TRAVEL AGENCY. While we are doing this pilot program, they have given us a VERY LIMITED AMOUNT OF THESE SPECIAL priced vacations to offer.

McCann admitted that the "this is not a sales call" line had been used but that he ordered it dropped. At his deposition, however, McCann said he let it be used because he saw nothing wrong with it. It was also conceded that no limit on the number of passports existed. Plaintiff's Exhibit 24 was similar to the above scripts but added at the close of the first paragraph, "This is being



offered to less than 1% of ALL the credit card holders in the U.S. At that price, you would like to go, wouldn't you?????"

Sales persons were instructed to follow the script and were given canned answers for recurring questions. With respect to an objection of a prospective purchaser to giving out a credit card number over the telephone, defendants had a prepared script intended to reassure. The response included the statement, "... we contact MC/VISA to verify [sic] your credit ... If we misused any credit card number, not only would we lose that merchant number [with MC/VISA] but no doubt, our bank would freeze our account for a complete audit



of all business on MC/VISA." Plaintiff's Exhibit 23-5.

Robert W. Werner, then serving as law clerk to United States Supreme Court Justice Lewis H. Powell, Jr., testified at trial that he had received a call from RTI Texas on December 17, 1986. The salesperson identified herself as Tina Jacobs. Werner testified that Jacobs told him that he had been selected by computer to receive a fantastic discount vacation. Specifically, he could obtain a full roundtrip expense paid trip for seven days and eight nights to Hawaii for \$329.90 with the condition that he also pay for a second roundtrip economy fare ticket. Werner expressed concern about whether he would be able to use the passport by



the expiration date, November 30, 1987. Jacobs told him the date could be extended and that he could obtain a refund if he changed his mind. Werner gave Jacob his VISA card number and Jacob's "manager," identified as Wes Sanders, came on the telephone. He recited the PAA, including the term that the purchase was not refundable. Werner questioned that term based on his prior conversation with Jacobs. Sanders reassured him that a refund was possible, that the term was included in the PAA to discourage people from asking for refunds. He also assured Werner that extensions were freely granted beyond the expiration date. Werner received the Vacation Passport and PAA a few days later. On reflection he



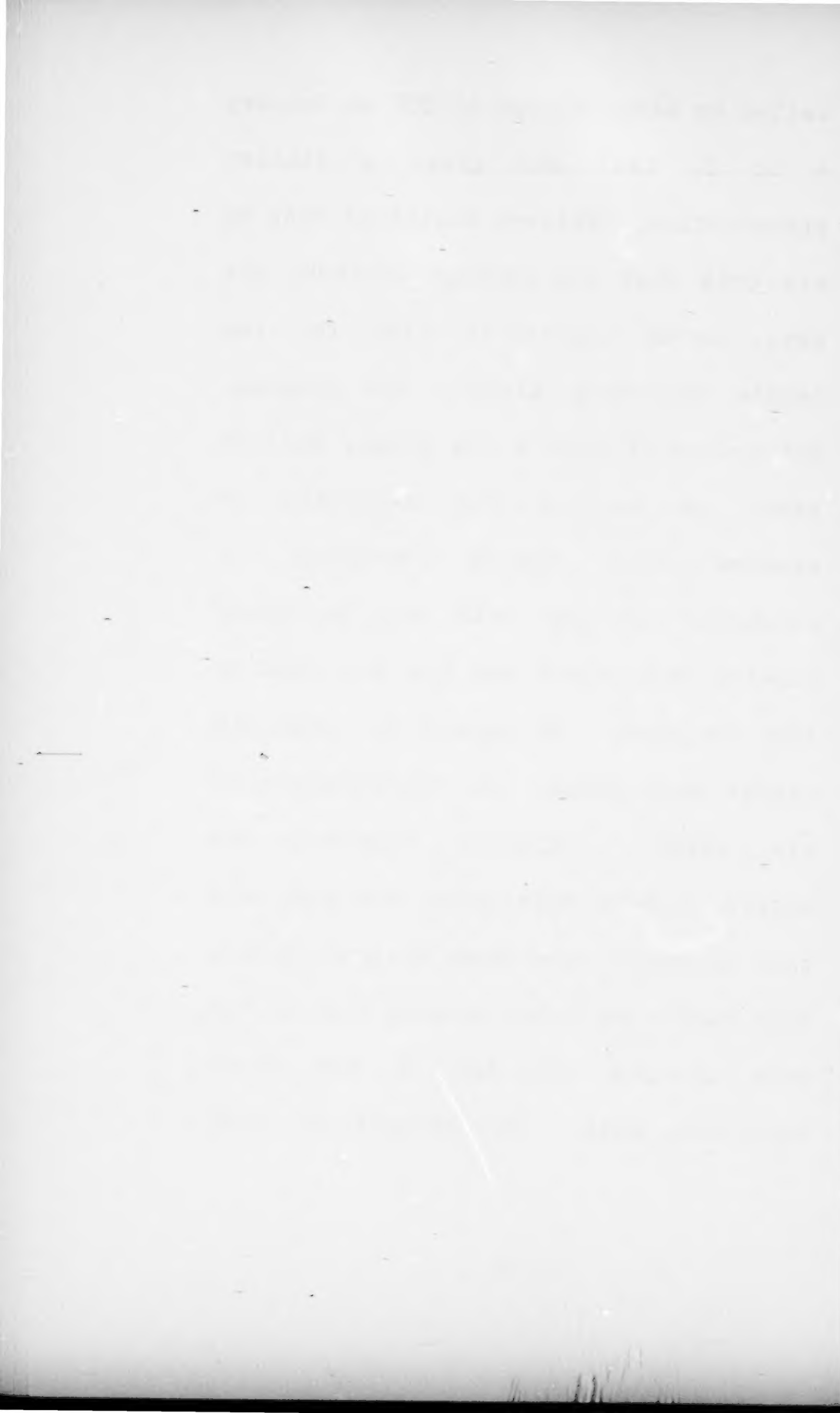
decided to cancel. He sent a letter on 12/29 to RTI Texas requesting a refund. Having received no response by January 28, 1987, Werner called a customer service number and requested a refund. He was told his refund would be processed by January 31 and that he would see it reflected in his account in 30 to 60 days. On February 13, not having information of a refund, Werner called again and was told to call back. He called again on March 23 and was told that all representatives were busy, they would call him back. On March 24, Richard Hall called him back and assured Werner that he personally would see that Werner's refund was processed. He did not receive a refund. On April 22, Werner called again and learned that

Hall no longer was employed there. He called two more times that day. During his last telephone conversation he was told that RTI Texas was under investigation and that their funds had been frozen for 90 days, but as soon as the freeze was lifted his refund would be sent. Werner asked for a letter confirming his right to a refund. Although he was told the letter would be sent, Werner did not receive such a letter and did not receive a refund. Werner understood during the sales conversation that he would have to purchase an additional fare but he did not understand at the time the economic consequences of the agreement.

Perry Whitson, a realtor from Edmund Oklahoma, testified that he was

There is a great deal of work to be done
in the way of building up the
country and making it a more
productive one. It is not
enough to have a few
farms and a few towns.
We must have a
system of roads and
a system of
communication.
We must have a
system of
education and
a system of
health care.
We must have a
system of
justice and
a system of
order.

called by Henry Sledge of TCT on January 4 or 5, 1987 and given a similar presentation. Whitson testified that he was told that the package included six days, seven nights in Oahu for two people including airfare and lodging. Suspicious of such a low price, Whitson asked to receive the materials to examine them before deciding to purchase. He was told that he would receive the packet and had ten days to look it over. He agreed to give his credit card number for verification of his credit. Whitson received the materials some days later and was told that he might have been charged on his VISA card. He later learned that he had been charged the day of the first telephone call. On January 6, 1987



Whitson wrote a letter to TCT cancelling "whatever business relation you think we have." He recited that Henry Sledge had told him "of a trip to Hawaii for \$329.90, my pick of hotels from your list, plus two airfares," and that Sledge's supervisor Jean Gordon had confirmed this. Later in the letter he insisted that he had been told to give his credit card number for a credit check only; "nothing was ever discussed about a charge being made." Whitson made a request for a credit from his VISA cardholder bank and this was done. Whitson, therefore, lost no money other than his telephone calls, postage and related expenses.

Bob Simonello, of New York, who described his occupation as "producing



multi-media industrial shows" and who holds a BS degree in advertising, testified that he had been called by Amy or an affiliate on January 2, 1987. He testified that he was told that he was offered a vacation package for two to a number of places including Florida, Hawaii and Acapulco for \$329.00. This amount included air travel and accommodation for a week. Questioning the low price, he inquired, "Are you saying I can go to Hawaii with a friend for no additional cost?" and the caller responded yes. The caller also assured Simonello that he could cancel within 30 days. The caller also assured Simonello that he could cancel within 30 days. Simonello agreed to give his credit card number over the telephone. When



Simonello received the vacation passport and materials, he believed that it did not describe what had been told him over the telephone in that it was not a package for two persons but rather he would have to buy a "Y-fare" additional ticket. In addition he was required to give names of three people who might be interested in the trip and Simonello objected to doing that. Simonello placed a telephone call to the number listed on the materials and stated that he wanted to cancel. He was told that he could not. After a number of telephone calls attempting to cancel, Simonello spoke with Lou Gowen. After he stated that he had reported the incident to the attorney general of New York, Gowen agreed to cancel and wrote a

letter confirming that his purchase had been cancelled. Nevertheless, Simonello has not yet received a credit on his charge account.

James Hooper of Avon, New York, a seventh and eighth grade math teacher, testified that he was called by RTI in October 1986. Hooper testified that the salesperson offered him a travel package for \$289.00 which included airfare and hotel accommodations for two to a variety of destinations. Because Hooper was in a hurry to leave at that time, he asked that the materials be sent to him for review and the caller agreed. The caller also asked for his credit card number to check his credit. Hooper gave her the number. In a few days Hooper received the materials and examined them.

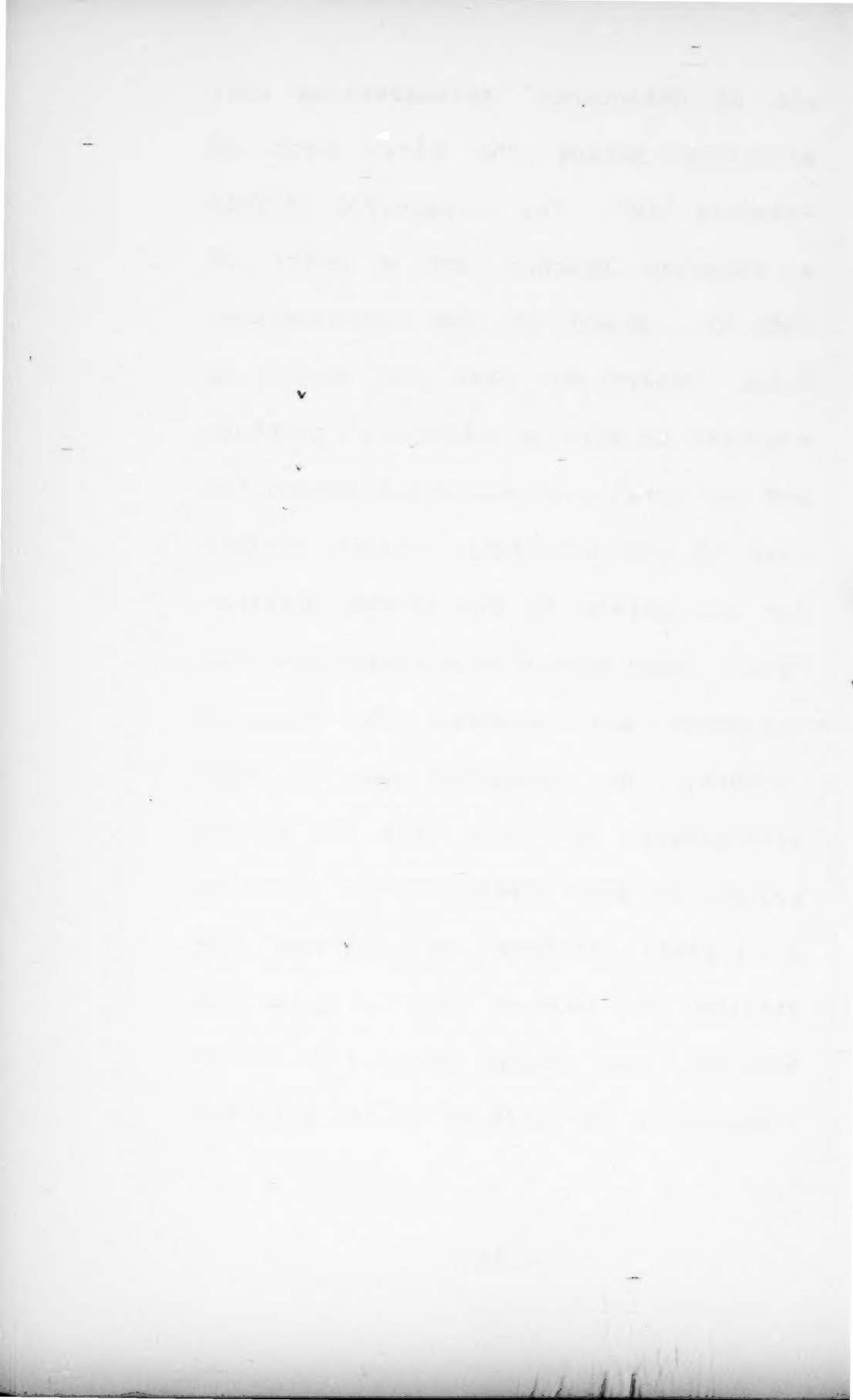
Letter to the Hon. the President of the United States
on the subject of the proposed
amendment to the Constitution
relating to the right of the States
to regulate commerce with foreign nations

My Dear Sir,
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the Constitution of the United States, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith

and even then did not realize that an additional charge was required. Nevertheless, he set them aside thinking that he had until November, 1987, to accept the offer. In December 1986, however, when Hooper received his Mastercard bill, he learned that RTI had billed him. Hooper disputed the bill with the Mastercard bank but eventually paid it in order to protect his credit rating. Hooper called RTI and complained to the America Society of Travel Agents and government agencies in an effort to obtain a refund, but he has not received a refund.

Fred E. Guinn, a police officer from Virginia Beach, Virginia, testified on behalf of the defendants. Guinn testified that he received a call from

one of defendants' telemarketing corporations during the first part of February 1987. The salesperson offered a vacation voucher for a price of \$386.00. Based on the conversation, Guinn understood that he would be required to make an additional purchase and the total cost would not exceed the cost of one roundtrip Y-class airfare for one person to his chosen destination. Guinn agreed to purchase over the telephone and received the vacation voucher. He contacted Amy to make arrangements for his trip to Disney World. He also researched the price of a Y-class airfare by calling two airlines and learned that the price was \$545.00. Amy charge Guinn \$836.00 in addition to the \$356.00 he had paid for



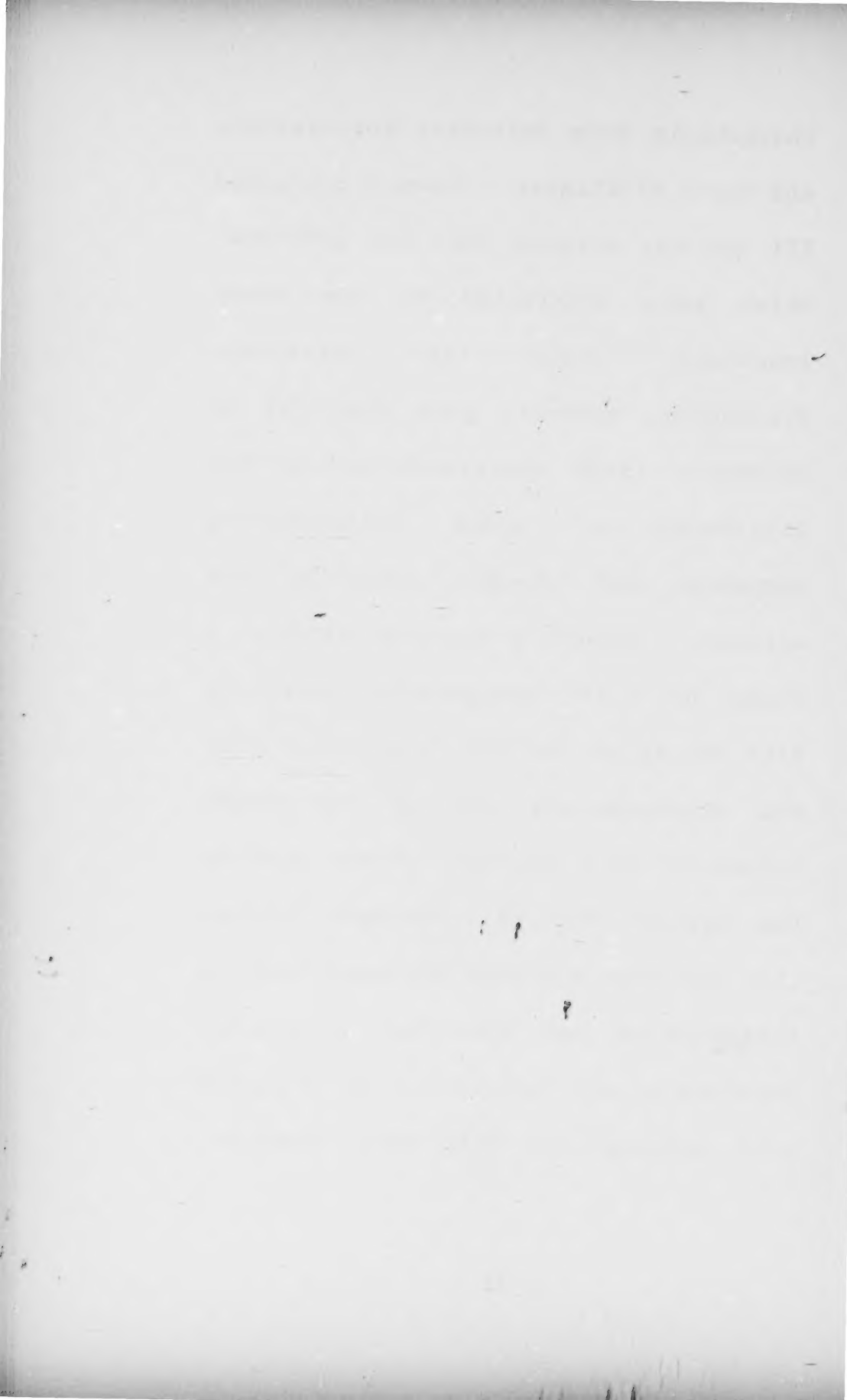
the voucher. Even though this amount was greater than the cost of a roundtrip Y-class airfare to his destination, Guinn was very satisfied with his purchase. In fact, he received a refund of \$88.03 for an overcharge which he had not even requested.

According to McCann, RTI began to receive complaints from consumers in July or August, 1986. Among the complaint letters in the record written to defendants (Plaintiff's Exhibits 201-249), the earliest is dated November 11, 1986 (Exhibit 224). These complaint letters were seized from the premises of the Texas locations which, according to McCann, were set up in late '86 or early '87.

Defendants also ran into difficulty with the banks handling their credit card transactions because of the high rate of customers disputing the charges resulting in chargebacks on the defendants' accounts. Kenneth J. Oros, an assistant vice-president for Shawmut Bank of Boston and manager of the credit card merchant department, testified in his deposition received in evidence that Shawmut Bank agreed to process credit card merchants' transactions for RPI, RTI and related companies around November 1, 1986. He testified based on his experience that a chargeback rate of approximately 3% would be normal for a telemarketing operation. By the beginning of 1987, Shawmut Bank was receiving an extraordinary number of



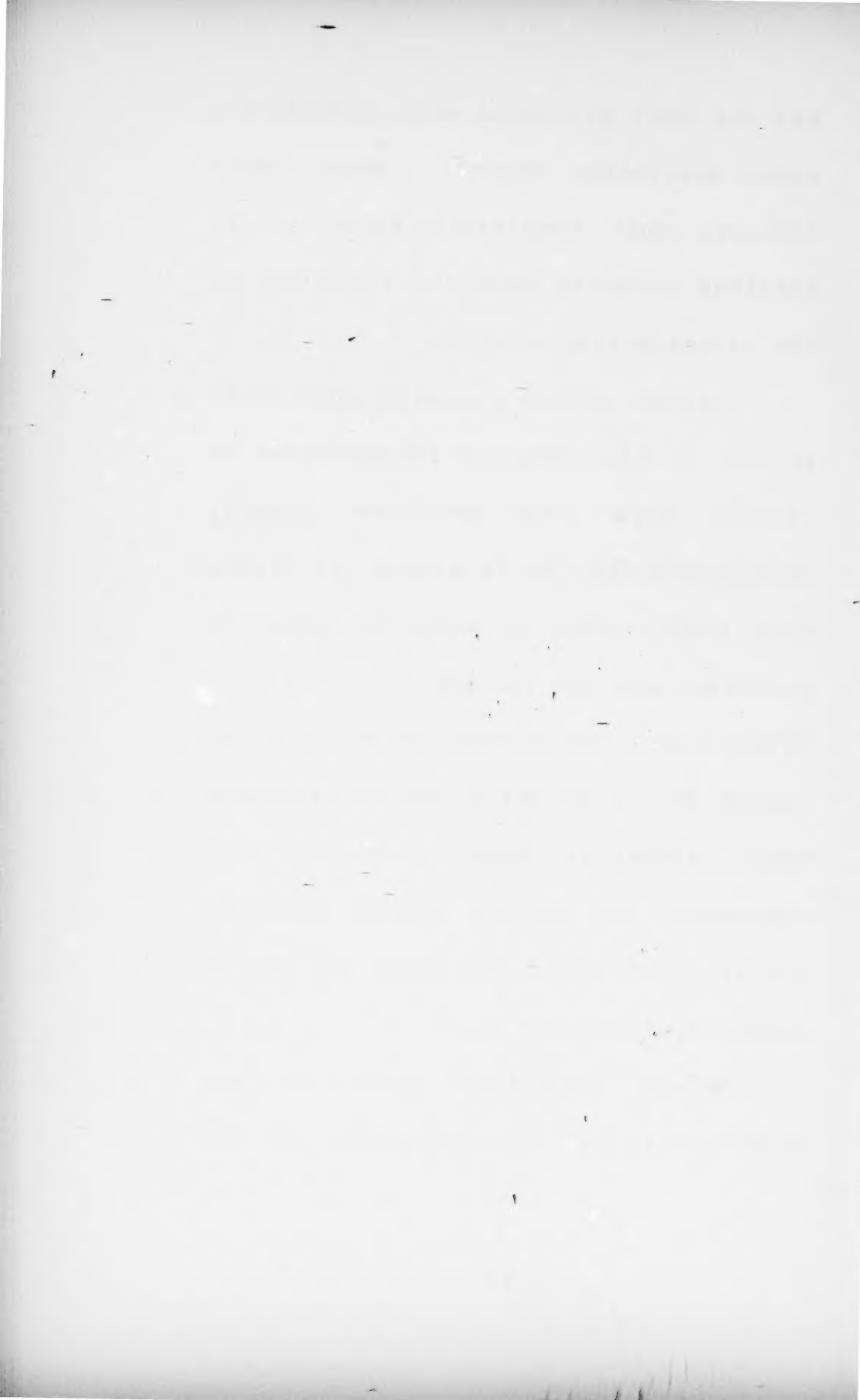
chargebacks from defendant corporations and their affiliates. Shawmut contacted RTI and was assured that the problems, which were attributed to the Texas locations, would be corrected. Eventually, however, more than 50% of Shawmut's total chargeback volume was attributed to these telemarketing companies and Shawmut cancelled the account. Shawmut's records reflect a total of 2,330 chargebacks totalling \$741,441.81 at the RTI locations. This was approximately 30% of the total volume of \$2.1 million. After opening the account for RPI, Shawmut learned that American Fletcher National Bank in Indianapolis had also had a similar experience and refused to do business with defendants. This fact, however,



had not been disclosed when defendant's agent approached Shawmut. These facts indicate that complaints began to be received promptly upon the launching of the telemarketing program.

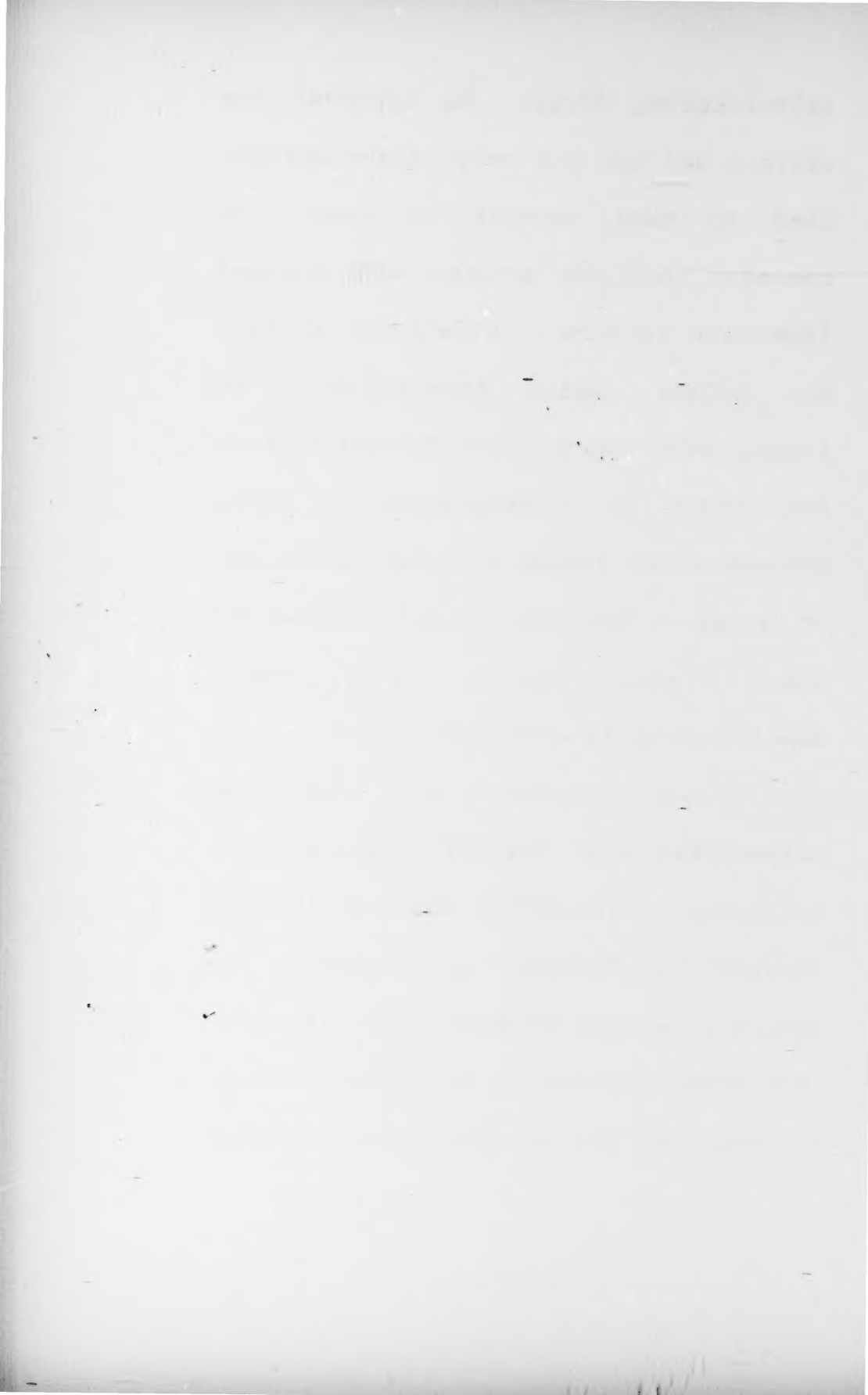
Written office policies apparently in use at RTI required salespersons to "[m]ake sure your purchaser clearly understands that he is giving his credit card number only in order to make the purchase, and not for any other reason." Nevertheless the authorized scripts and canned answer to which the salespersons were ostensibly bound made no such statement, but rather stated that the credit card would be used to verify credit availability.

McCann testified that he was responsible for all operations of the



telemarketing firms. He approved the scripts and was the only person authorized to make changes in them. He conceded that the scripts were changed from time to time. Defendants Weiland and McCann, being knowledgeable in sales, were aware that deviation from the script is a temptation to sales persons whose income is based on volume of sales. This was also conceded by their witness Eugene Staley, whose deposition is in evidence.

McCann conceded that he was responsible for the official scripts including Plaintiff's Exhibit 7 and Plaintiff's Exhibit 3, although he denied knowledge of many of the scripts that were received in evidence. He explained that his attorneys had reviewed



and approved the script material before it was put into use. Despite his admission that defendant corporations began receiving complaints in the fall of 1986, McCann contended that it was not until after the "raid" in February, 1987 that his companies began having problems with complaints. This is not borne out, however, by the governmental investigations and the complaint letters obtained from defendants' files which predated February, 1987. Defendants have also complained that the FTC and other law enforcement authorities put them out of business by freezing all their assets. Although it is true that assets have been seized, defendants have pointed to no restraint on their ability to use funds to make refunds to consumers.

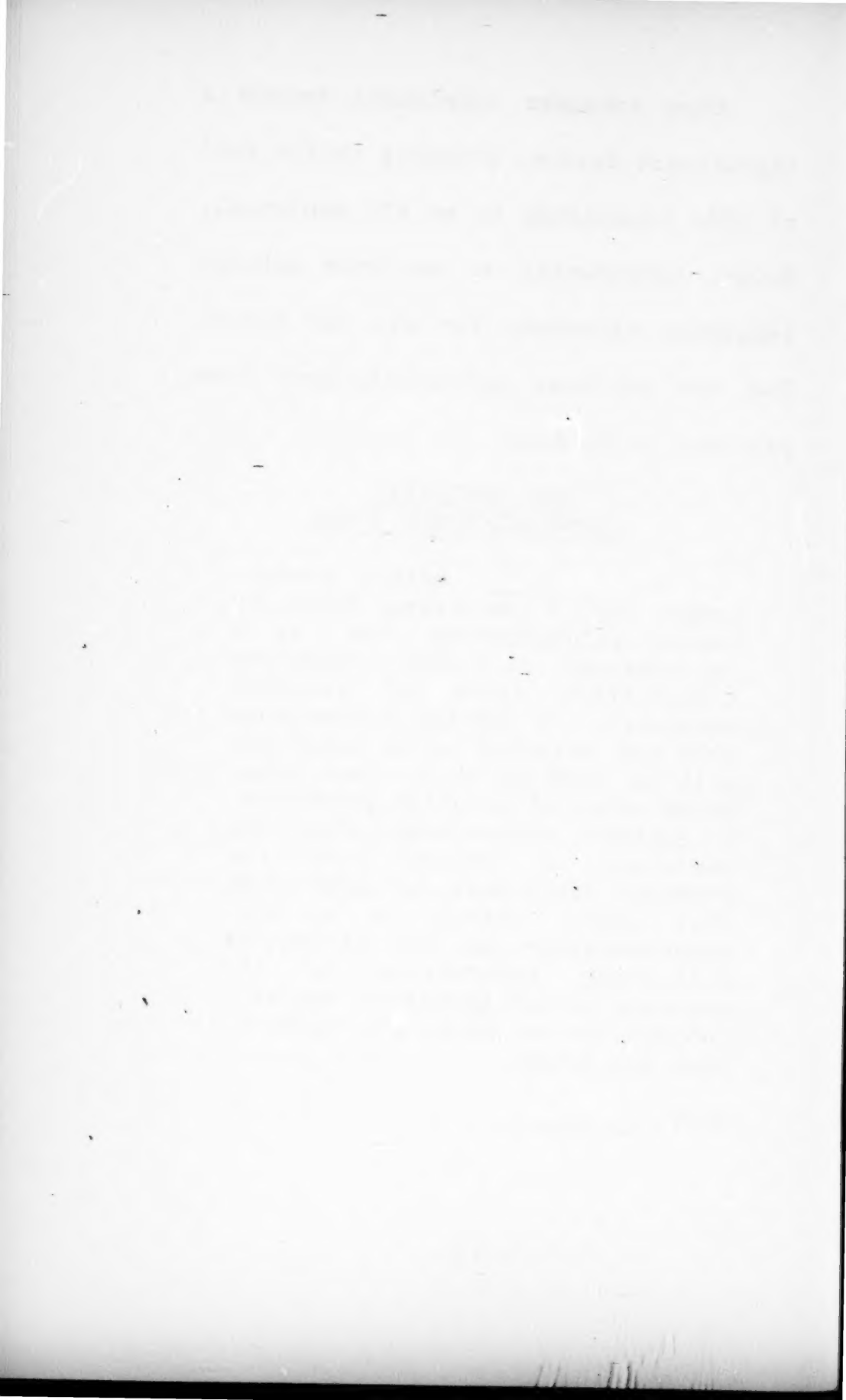


Once consumer complaints became a significant factor, probably in the fall of 1986 (according to an RTI employee), McCann implemented an employee acknowledgement agreement for all new hires. The new employee acknowledgement form provided as follows:

NEW EMPLOYEES
ACKNOWLEDGEMENT FORMS

I, _____, hereby acknowledge that I am being hired by Resort Telemarketing, Inc. as a salesperson to make telephone solicitation sales of vacation passports. I further acknowledge that the attached pitch materials will be used by me to take telephone sales of vacation passports. I further acknowledge that any deviation or change from the attached pitch material made by me that would result in a misrepresentation or the giving of misleading information to the customer is not permitted and will subject me to immediate termination for cause.

DATE: _____



Employee

A similar document was provided to supervisors. In addition, in at least some of the offices, including the Texas offices, the telephone system permitted monitoring the calls of the sales persons to determine whether they were deviating from the script. It is uncontroverted that some employees were discharged for deviations from the script, although defendants did not name any names or indicate that records were kept to document this testimony. McCann also implemented a procedure to verify the sales before the credit card authorizations were transmitted to the bank. This process, according to the



deposition testimony of Janie Blair, office manager for RTI, involved telephoning the purchaser and reading the PAA again to him or her over the telephone.

Despite these efforts, the evidence is overwhelming that deviations from the script occurred on a regular basis. The seizure of documents by the Texas Attorney General yielded numerous handwritten scripts with substantial deviations from the official script. These documents were seized from the desks of sales people, so it is inferred that sales persons were in fact deviating from the official script to a substantial degree. For example, Plaintiffs Exhibit 11 bears the name D. Bill and reads:



"HI, MY NAME IS _____, I'M CALLING FROM RTI IN HOUSTON, TX. THE NATURE OF THIS PHONE CALL IS TO INFORM YOU THAT YOU HAVE BEEN SELECTED TO RECEIVE A 'FULLY' PAID VACATION FOR TWO PEOPLE TO HAWAII OR ONE OF 7 OTHER LOCATION FOR 8 DAYS AND 7 NIGHTS IN A FIRST CLASS HOTEL ACCOMODATIONS FOR TWO PEOPLE ROUND TRIP AIRFARE AS WELL AND THE TOTAL COST OF THE PKG IS ONLY \$329.90 TOTAL."

Joseph T. Soltis, Jr. and Charles Kennedy, through testimony concerning their work for ACMI, lent credence to the evidence that deviations occurred. Soltis was a telemarketer there from July 3, 1987 through July 30, 1987. He reported that the official scripts changed at least five times while he was there. He admitted that he had deviated from the script in order to make sales and he believed that supervisors had



overheard him doing so without reprimanding him. He never heard a supervisor reprimand any telemarketer for deviating from the script although he observed it as a common practice at ACMI. Kennedy similarly testified that he worked for ACMI from July 26 through August 3, 1987. He also testified that official scripts changed frequently. In fact, he was applauded by his supervisor for deviating from the script in order to make a sale. Kennedy testified that his supervisor, Pam Cerny, had specifically told him it was all right to "ad lib," so he changed his pitch to say "I'm going to send you to Hawaii for under \$300.00," and Cerny said that was "great." Kennedy and Soltis conceded that ACMI still owed them some money,



but the court nonetheless finds their testimony credible.

Weiland also admitted that he was directly involved in the telemarketing activities although his primary responsibility was to run Amy. He was involved in the development of the sales and promotional materials. He testified that salespersons withheld the actual price from purchasers not in order to deceive, but because the future price of any airline ticket would be unknown at the time of the sale. This, of course, is true but it is obvious that the price on the day of the sale would have been available to give the purchaser a reasonable estimate. More plausibly, as Eugene Staley, a former RTI employee conceded, revelation of price would not

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have created the desired enthusiasm in consumers to purchase the passport. "It was not our business to educate the public."

Amy is an Illinois corporation also located in Naperville. Amy distributed the Vacation Passport to the telemarketing companies. Otherwise, it functioned solely as a travel agent, receiving orders for reservations and arranging trips for those who had purchased from the telemarketing companies. Amy was wholly owned by the same persons who owned the other telemarketing companies. Amy was managed by defendant Weiland and Cecilia Pradhan. Amy did not, according to Pradhan, make a profit. Rather it was intended that the companies' profit

would be recovered in the \$329.00 sales transaction. Amy's name, however, was used in all the sales promotions and it was the exclusive travel agent for purchasers to use Vacation Passports. Pradhan was primarily responsible for making and supervising travel arrangements. When an Amy employee booked a trip, he or she disclosed the price to the purchaser.

Susan Tanzman-Kaplan was qualified as an expert in travel law and in consumer understanding of travel related documents and disclosures. In her opinion, the use of the term "unrestricted round trip, (Y-Class) full economy air fare" (Plaintiff's Exhibit 7) is misleading because "economy" connotes cost saving while "unrestricted



Y-class" connotes the highest fare one can pay for a ticket under first class. In addition, in Tanzman-Kaplan's opinion, the public is not familiar with what Y-class costs. Tanzman-Kaplan also held the opinion that the use of the term voucher was misleading because voucher in the travel industry connotes a fully paid purchase so that presentation of the voucher entitles one to the product. Nevertheless, Tanzman-Kaplan conceded that it is not misleading or unusual for a consumer to pay a fee in order to purchase a vacation at a discount price. The expert also stated her opinion that the guarantee in the PAA (of the "lowest cost of your vacation itinerary including both airfares and lodging for two people, or they will



pay you triple the difference in cash if you can find the same lodging as we offer and the same air fares for a lesser amount") was misleading because it communicates that Amy will guarantee the lowest price to get to a destination, but in fact it limits the purchaser's cost to a Y-fare which would normally be a relatively high price. It was Tanzman-Kaplan's opinion that the failure to disclose the price of the vacation was deceptive. Tanzman-Kaplan also believed that the material was deceptive because it is not clear whether the \$329.90 could be deducted from the Y-class "cap" on the price.

Unrebutted evidence offered by the Commission reveals that the offer was not a bargain. The affidavit of Phillip



G. Davidoff of the American Society of Travel Agents recites that on April 28, 1987 the roundtrip Y-class fare from Washington, D. C. to Honolulu was \$1,936, but a vacation package to Waikiki for two including airfare and accommodations for seven nights was available that day for \$1,198. In light of this, the passport was of little if any actual value.

Alexander Anolik testified for the defendants. As a qualified expert on travel law and travel related services, Anolik gave the opinion that the placing of the cap of a Y-class airfare in the context of the script and the PAA was not deceptive, particularly in light of market conditions since recent general deregulation of the travel industry by



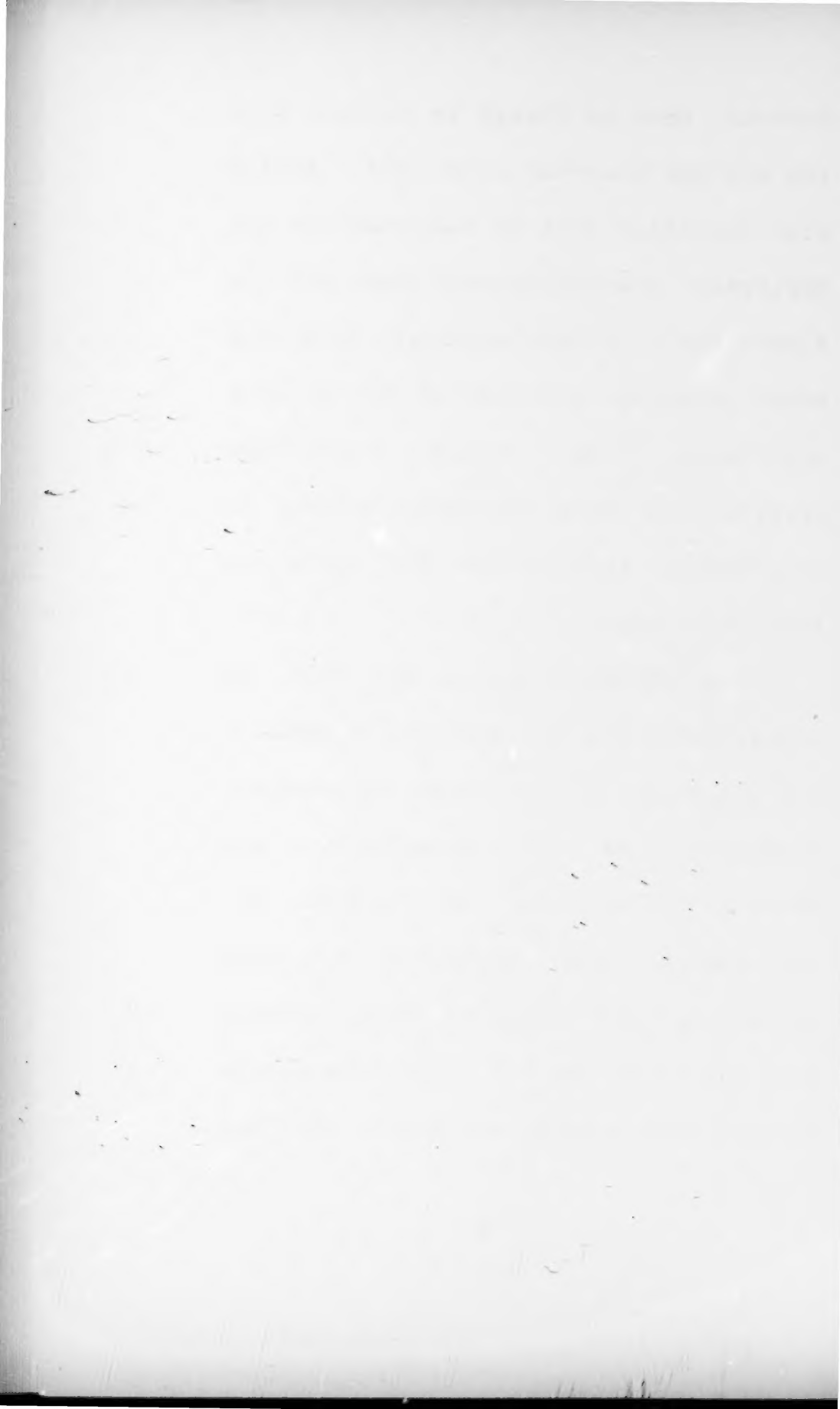
the Civil Aeronautics Board. Print advertisements with similar "come-ons" were received in evidence as examples of advertising technique being used now that were not used prior to deregulation.² In substance, the court interprets this testimony to suggest that since deregulation, more and more travel marketers are using techniques such as RTI's, and therefore the public would not be deceived because it is now educated to be wary. Anolik conceded,

²For example, defendants' Exhibit 3 is an advertisement by a bank urging the reader to open a charge account with a restaurant chain. Among the benefits was a "2-for-1 flight certificate," good for one free roundtrip ticket when a full-fare, roundtrip coach ticket on Midway Airlines is purchased."



however, that no change in section 5 of the Act has occurred since 1938. Anolik also testified that he had examined the employees' acknowledgement form and the supervisor's acknowledgement form and other personnel policies of RTI and its affiliates. He stated that the restrictions were extremely strong in threatening termination for deviation from the script.

The affidavit of Jo Ann Chin, an investigator for the division of marketing practices in the Bureau of Consumer Protection of the Commission, was received in evidence. Chin states that she analyzed the complaints that were seized by the Texas attorney general from RTI Texas and TCT. These materials reflect that between October 4, 1986 and



February 1, 1987 RTI Texas' sales were \$2,066,414 and TCT sales were \$1,590,925 based on total weekly sales figures. She also stated that defendants' own files contained approximately 2,000 complaints. She analyzed 518 of those complaints to ascertain the nature of the complaints made to the company. Her analysis revealed that 54 complained that they had not been told of the requirement to purchase an additional ticket or were told that the cost of the voucher represented the second ticket. Forty-three complained that the Y-class cost of the required ticket was misrepresented or excessive compared to other class tickets. One hundred thirty-two consumers complained to



defendants that they had never authorized charges to their accounts.

On May 5, 1987 the district court of Harris County, Texas (Cause No. 87-015621) entered a final judgment by consent without an admission of liability on the part of defendants against RTI Texas, TCT, RTI, RPI, Amy, McCann and Weiland. The judgment enjoined the defendants from engaging in, inter alia, using any phrase in the sales pitch that would lead the consumer to believe that the purchase of a travel certificate would entitle a consumer to a trip without further cost; stating that a travel certificate entitles a consumer to purchase the trip at a cost not to exceed one full coach airfare in addition to the cost of the certificate;



using the term "economy" when referring to the airfare that a consumer must pay to purchase a trip; stating that a limited number of certificates were available if such is not the case; making charges on any consumer's credit card without telling the consumer that the charge will be made the same day; processing a charge to a consumer's credit card on the representation that (a) material would be sent to the consumer for approval and that no charge would be made until the consumer had reviewed the material; (b) stating that no charge would be made until the consumer chose to travel; (3) or stating that the card number is obtained to verify eligibility.

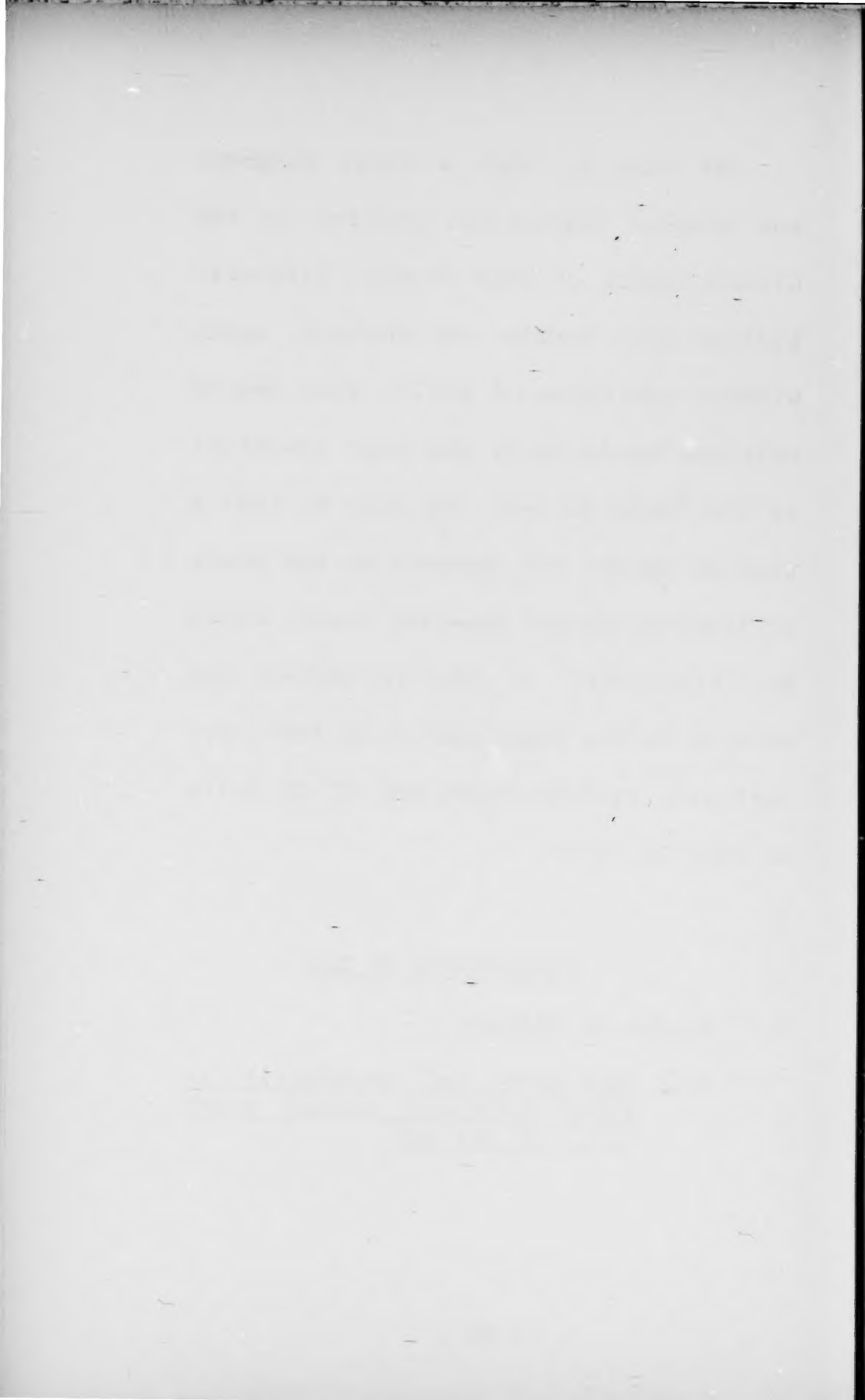


On June 1, 1987 a final judgment and consent decree was entered in the Circuit Court of Cook County, Illinois, against Amy, McCann and Weiland, again without admission of guilt, this decree enjoined essentially the same practices as the Texas decree. On July 9, 1987 a similar decree was entered in the State of Indiana, Marion Superior Court, Cause No. S787-0701. A similar decree was entered in the Commonwealth of Kentucky, Jefferson Circuit Court No. 87 CI 06118 on July 28, 1987.

CONCLUSIONS OF LAW

I. Motion to Dismiss

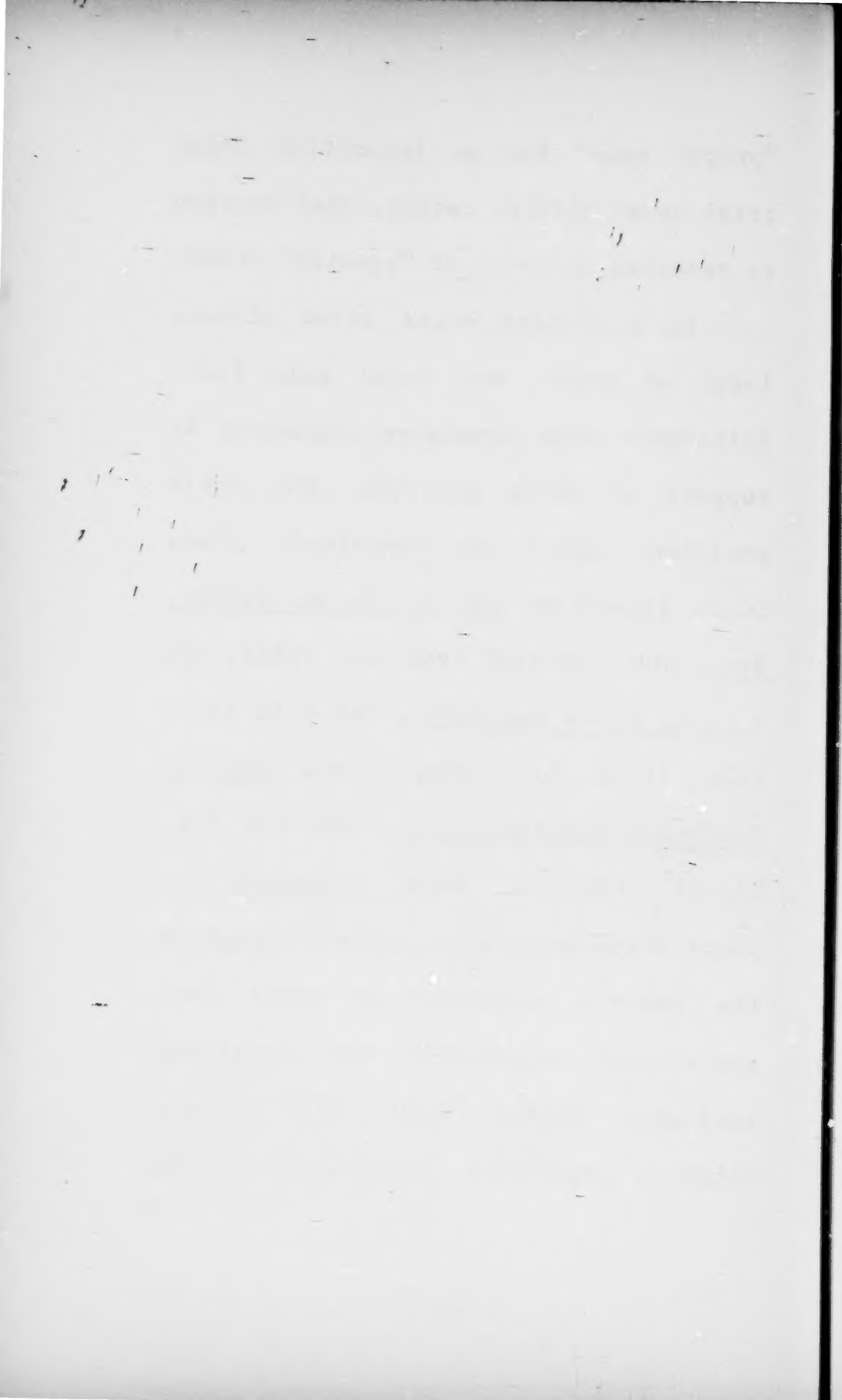
- A. This court had jurisdiction to enter temporary relief under 13(b) of the act.



On the eve of trial defendants moved to dismiss the complaint under Rule 12, Fed.R. Civ. P., for lack of jurisdiction and for failure to state a claim, and to vacate the preliminary injunction entered on August 3, 1987. Defendants contend that the court has no jurisdiction under section 13(b) of the Act, 15 U.S.C. § 53(b), to grant temporary injunctive relief. They also contend that even after trial the court lacks jurisdiction to grant anything other than an injunction. The court may not, they argue, order rescission of contracts, restitution to consumers, a freeze on all defendant's assets, or the imposition of personal liability against defendants McCann and Weiland. Defendants also argue that this is not a

"proper case" for an injunction after trial under §13(b); rather, that section is reserved to cases of "routine" fraud.

In a 37-page brief filed without leave of court, see Local Rule 9(d), defendants make expansive arguments in support of their position, but their position cannot be sustained. This court relies on FTC v. H. N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984); and FTC v. Southwest Sunsites, Inc., 665 F2d 711, 717-19 (5th Cir. 1982) (Sunsites I), cases which defendants concede recognize the court's authority to grant both preliminary injunctive and ancillary equitable relief under the court's inherent equitable jurisdiction. In



light of Commodities Futures Trading Commission v. Hunt, 591 F.2d 1211, 1219-2 (7th Cir. 1979), addressing this "identical question"(defendants' characterization) in examining a similar provision in a different statute, there is little doubt that the Seventh Circuit would agree with the Fifth, Ninth and Eleventh Circuits on this issue. See also FTC v. American National Cellular, Inc., 810 F.2d 1511, 1514 (9th Cir. 1987); FTC v. Engage-A-Car Services, Inc., slip op., No. 86-3758 (D. N.J. Dec. 18, 1986) (Westlaw FABR-CS Library); FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1296 (D. Minn. 1985) (all cases in which the court issued preliminary injunctive relief in section 13(b) actions).

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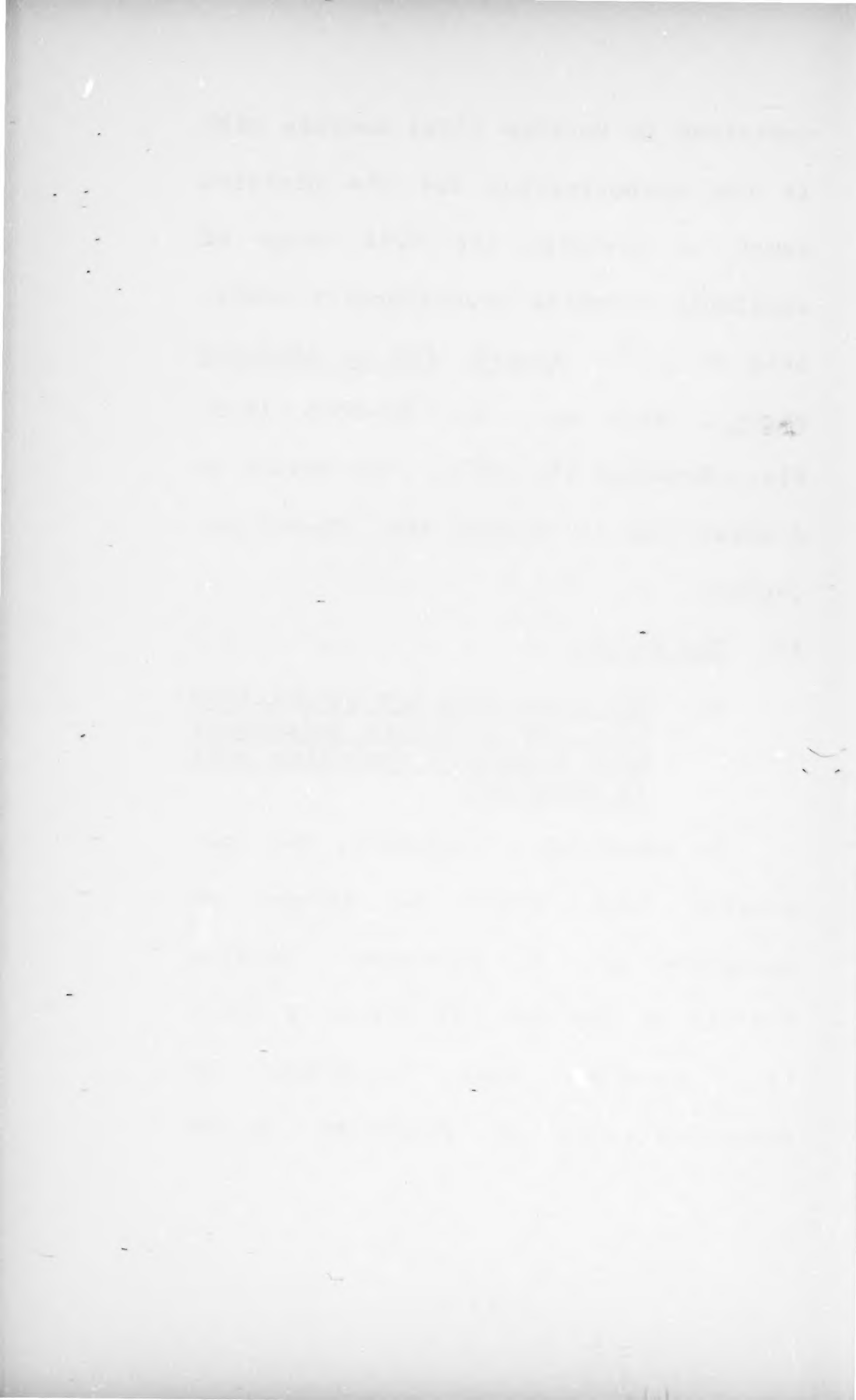
Defendants also argue that the legislative history, particularly S. Rep. No. 151, 93rd Cong. 1st Sess. 31 (1973), supports defendants' position that the district court does have the full panoply of equitable remedies available to it. The court does not find such a meaning in the legislative history and sees no authority for limiting the court's equitable powers here. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, a full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 1089 (1946). See Sunsites I, 665 F.2d at 718 ("[A] grant of jurisdiction such as that

contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it.") Accord, FTC v. Atlantex Assoc., slip op., No. 87-0045 (S.D. Fla., November 25, 1987). The motion to dismiss and to vacate are, therefore, denied.

II. The Merits

- A. The Commission has established that the corporate defendants have committed deceptive acts in commerce.

To establish a violation, the Commission must prove an unfair or deceptive act or practice. Section 5(a)(1) of the Act, 15 U.S.C. § 45(a)(1), provides that "...unfair or deceptive acts or practices in or



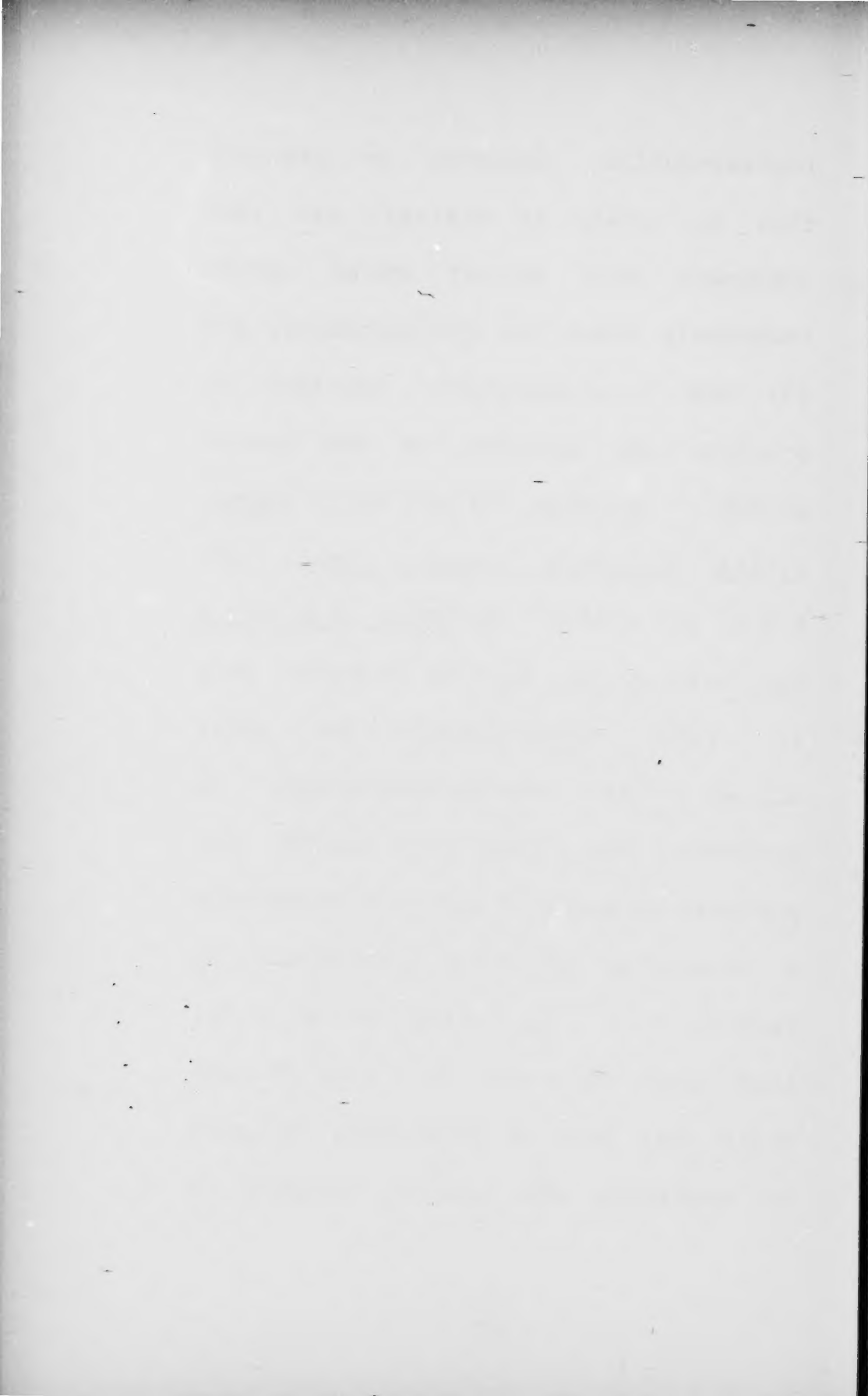
affecting commerce, are declared unlawful." Because deceptive acts have been clearly shown, the distinction between unfair and deceptive practices will not be discussed herein.³

To establish that an act or practice is deceptive, plaintiff must show (1) a

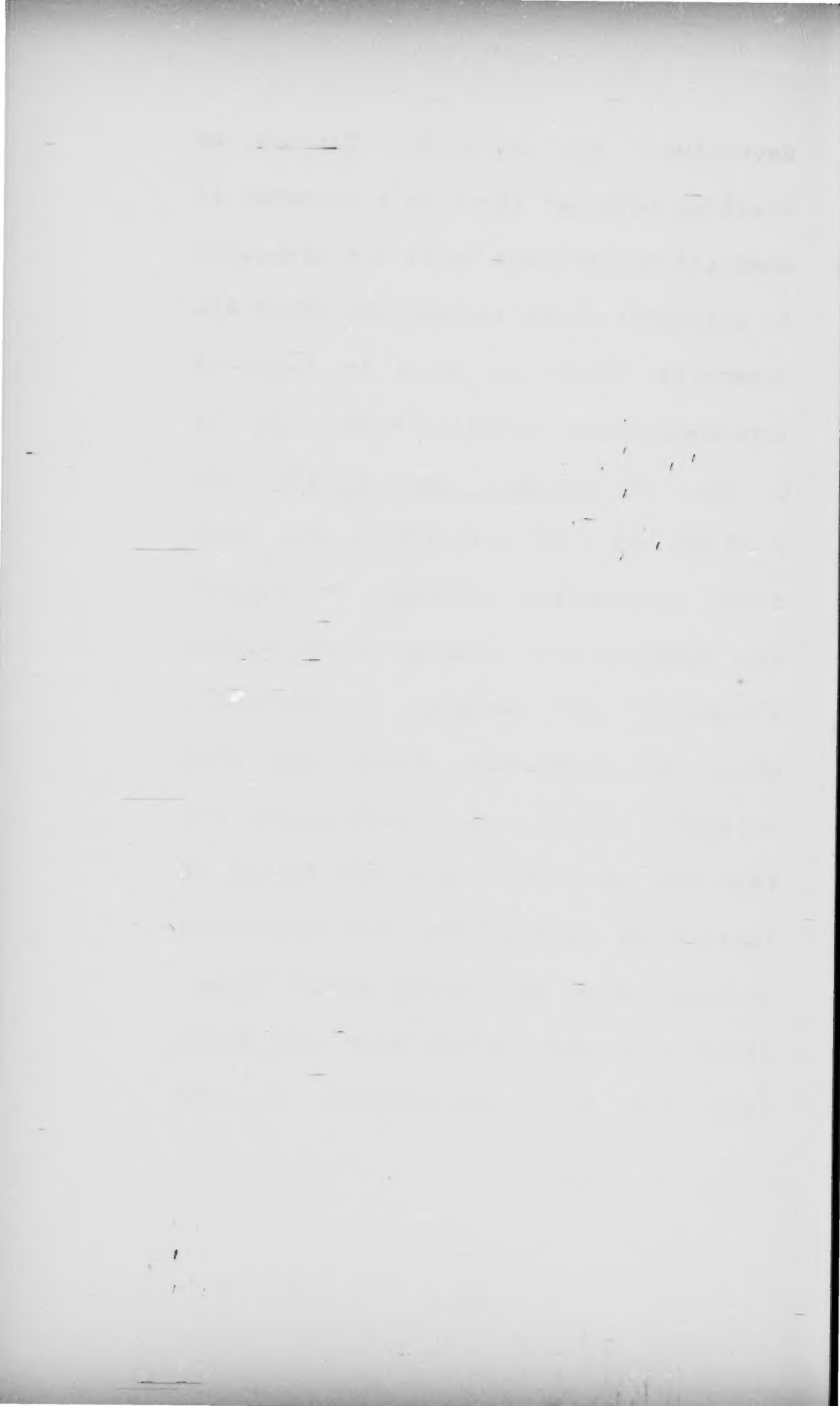
³In *American Financial Services Assoc. v. FTC*, 767 F/2d 957, 979 (D.C.) Cir. 1985), the court explained that "... the distinction between the deception rationale and the unfairness rationale tends to become obfuscated. Nonetheless the two rationales are distinct: A practice is deceptive when the consumer is forced to bear a larger risk than expected (e.g., the consumer is misled) whereas a practice is unfair when the consumer is forced to bear a larger risk than an efficient market would require." Id., n.27, citing generally Craswell, "The Identification of Unfair Acts and Practices by the Federal Trade Commission," 1981 Wis.L.Rev. 107.



representation, omission or practice that is likely to mislead; (2) that consumers were misled while acting reasonably under the circumstances; and (3) the representation, omission or practice was material to the transaction. Atlantex, slip op., supra, citing Cliffdale Assoc., Inc., 103 F.T.C. 110 (1984). In FTC v. U.S. Oil & Gas, slip op, No. 83-1702 (S.D.Fla, July 10, 1987) (unpublished), the court stated that misrepresentations of material fact made to induce the purchase of goods or services constitute a deceptive practice prohibited by Section 5(a). Id., slip op. at p.34. Also, said the court, the sale of services that have no reasonable prospect of achieving the results claimed is

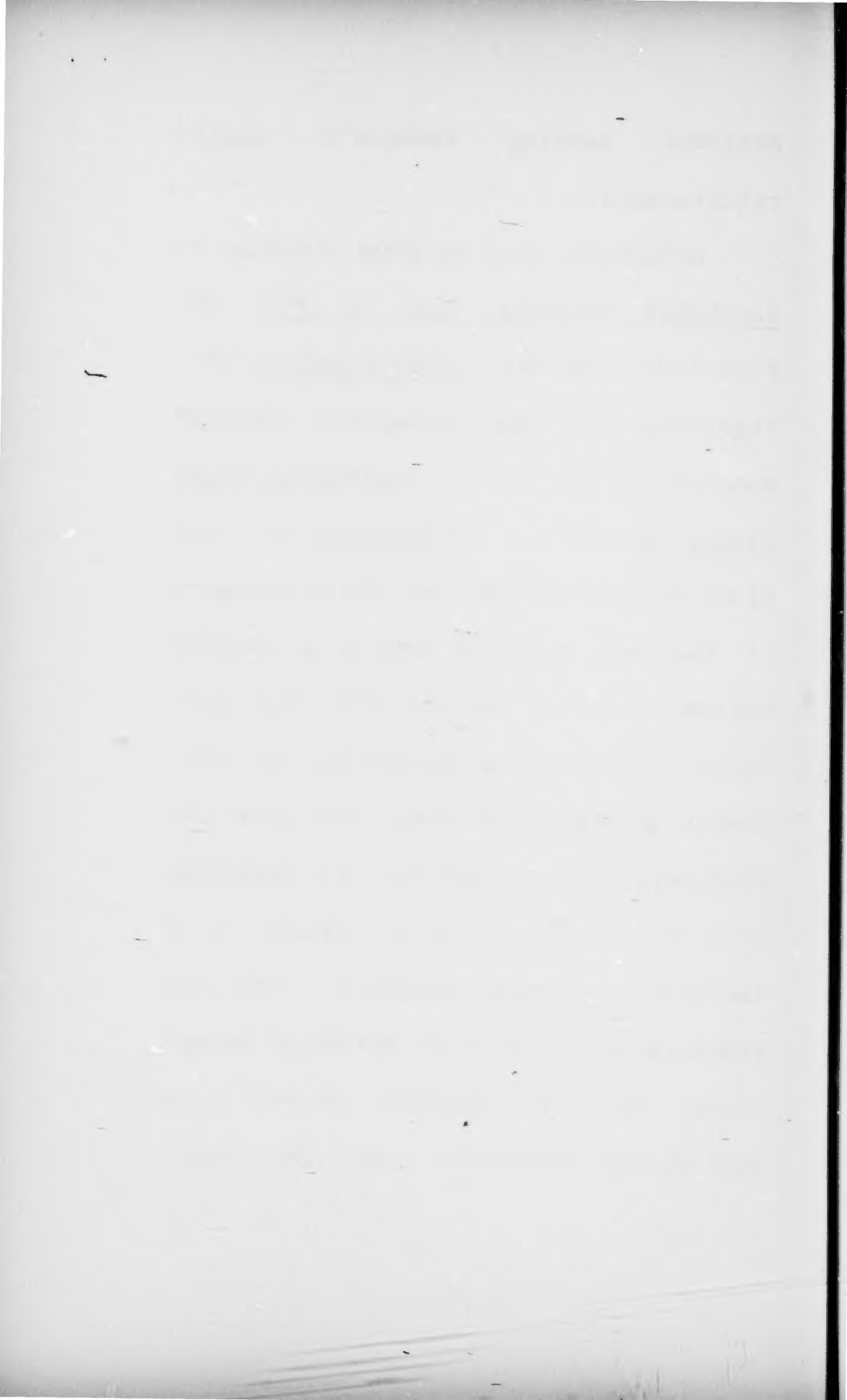


deceptive. Id., at p.35. Failure to disclose material facts to a consumer is when the undisclosed facts are necessary to dissipate false assumptions which are otherwise likely to arise in light of representations actually made. Id. at p. 36. In Speigel, Inc. v. FTC, 494 F.2d 59, 63 (7th Cir. 1974), the court found substantial evidence to support the Commission's finding of deception ("capacity and tendency to mislead") where the Commission found, not that Spiegel's offers were unconditional, but that the conditions were not stated or located in such a way that customers without undue difficulty would understand that the offers were not truly free but were conditional on the



customer meeting Spiegel's credit requirements.

Defendants rely on some language in Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986)(Sunsites II), regarding the "new" deception standard adopted by the FTC in Cliffdale Associates in 1984. In Sunsites II, the Ninth Circuit stated that three elements of the new standard impose a greater burden of proof on the FTC: (1) probable, not possible deception; (2) consumers acting reasonably, not just any consumers; (3) deceptions are material only if likely to cause injury to a reasonably relying consumer. The old standard considered as material deceptions that a consumer might have considered important. But the court



rejected defendants' contention that the new standard was substantially different from the old one. 785 F.2d at 1436. This is borne out by reading the Opinion of the Commission in Cliffdale Associates, in which the Commission states: "Consistent with its Policy Statement on Deception, issued on October 14, 1983, the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material." The Commission added, "These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or

practice was deceptive, even though the language used in those cases was often couched in such terms as 'a tendency and capacity to deceive.'... The requirement that an act or practice be 'likely to mislead,' for example, reflects the long established principle that the Commission need not find actual deception to hold that a violation of Section 5 has occurred. This concept was explained as early as 1964...." [Emphasis in original] Cliffdale Associates, 103 F.T.C. at 164-165.

Similarly, the requirement that an act or practice be considered from the perspective of a "consumer acting reasonably in the circumstances" is not new....[T]he law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few....The third element is materiality [which] involves

information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.

Id. Finally, actual injury is not required. Id. at 166, n.11.

1. Defendants made representations and omissions and acted in a manner likely to mislead.

Defendants argue that their authorized script was not deceptive because the term Y-class unrestricted full economy airfare was an honest way to communicating a price cap on the offer. Placed in context, however, the argument cannot be accepted. First, the script opened with the strong implication that the price was "only \$329.90," reinforced by the false statement that the person was one of a select group of preferred credit card holders and the remark, "At

Information sent to agencies in
conjunction with other data is
likely to be of value in the
conduct of research.

10. Other - This section is not in

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1. Information - This section is not in
question 10, but is a

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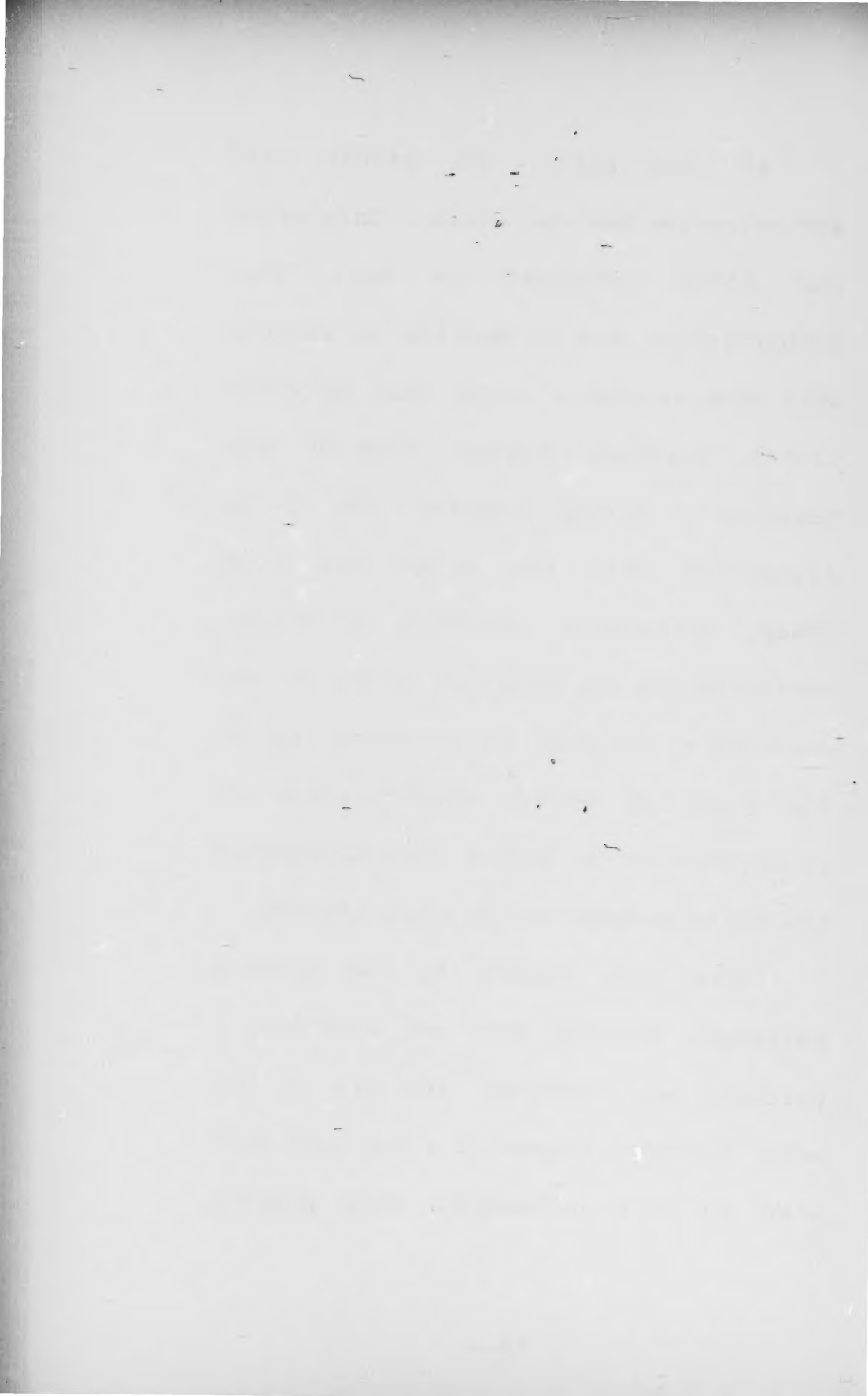
that price, I'm sure you'd like to go....." Defendants were obviously aware that the price come on would mislead because they anticipated the "probably question," "Why so cheap?" A few sentences later, before mentioning that an additional purchase was required, the script again refers to "such a low price," then stating,

For only \$329.90 you will receive your vacation voucher which entitles you to a fully paid vacation for 8 days and 7 nights for (2) people at a beautiful resort hotel, plus two roundtrip airfares, for a cost not to exceed (1) unrestricted economy airfare."

A reasonable listener over the phone would likely believe that the cost of the package was \$329.90 which was equivalent to one unrestricted economy airfare.

At that point, the credit card authorization was requested. Only after the script proposed to have that authorization did it mention in reasonably understandable terms that an additional purchase beyond \$329.90 was required. Having created the false assumption that the price was very cheap, defendants' omission of price, obviously the key material factor in any consumer's decision to purchase, or at the least an honest approximation of price, reinforced rather than dissipated the false assumption they had created.

Even with respect to the closing paragraph stating that an additional purchase was required, the use of the word "economy" suggested a low cost fare when in fact defendants were pegging



their price to a very expensive fare, the unrestricted Y-class fare. This is deceptive because the evidence reveals that the consuming public does not know the meaning of the term Y-class, making "economy" the message likely to have been communicated.

The script was also deceptive because its clear message was that the Vacation Passport was a great "deal," a bargain that couldn't be passed up, but in reality it was not a bargain at all, for comparable or less expensive vacation packages were readily available in the market at the same time. See affidavit of Mary T. George, Plaintiff's Exhibit 102; affidavit of Sharon T. Foster (Plaintiff's Exhibit 103B). As such, this was a sale that had no

shall be a very expensive one

the first thing I shall do

and the second thing I shall do

and the third thing I shall do

and the fourth thing I shall do

and the fifth thing I shall do

and the sixth thing I shall do

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and the twentieth thing I shall do

reasonable prospect of achieving the results claimed and was therefore deceptive.

It can also be concluded without difficulty that defendants' actual practices, apparently caused by gross lack of disciplinary and management skills rather than a barefaced scam, adlibbing off the authorized script. The testimony of the trial witnesses in addition to the affidavits received in evidence, in which consumers had been given false promise that do not appear on an authorized script, lead to the conclusion that deviations occurred on a widespread scale. Obviously, representations that the total price was \$329.90, for example, were misleading. Likewise, representations that consumers could

look over the materials before deciding to purchase, made while actually billing the consumer, were misleading.

The other major deception was the defendants' practice of obtaining a credit card number by the caller stating that he or she wanted to verify that the customer had available credit. In light of defendants' canned response to probably objections to it, which actually stated this reason, defendants can hardly argue that they didn't do it. And even though their office policies ostensibly prohibited it, the very response the employees were required to read said the purpose was to verify credit, nothing else. Perhaps more important, although the policies required employees to make sure the

look upon the enterprise as a failure
in business and as a loss of time
the company was selling

The first year business was not
prosperous, however, in the second
year the company was able to
secure a large order from the
government for the construction
of a new building for the
Department of the Interior.
This order was for the construction
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Department of the Interior.
The company was able to
secure a large order from the
government for the construction
of a new building for the
Department of the Interior.

customer understood that the number was for a purchase, nothing in the authorized script to which they were purportedly tied, said it.

Finally, the evidence is overwhelming that numerous people were billed for passports in circumstances lacking their consent, e.g., witnesses Werner, Hooper, Simonello, as well as the affidavits of Jill G. Johnstone (Plaintiff's Exhibit 101) and Walter Worley Fain (Exhibit 108). The greatly excessive charge-backs experienced at the bank are further corroboration that consumers legitimately disputed the charges made.

2. Consumers - acting reasonably were actually misled.

In U.S. Oil & Gas, the district court stated that proof of reliance by each consumer is not required and found sufficient evidence to support an order of restitution based on the following evidence: (1) evidence of widespread misrepresentations; (2) common sense judgment that the misrepresentations would be central to the decision of a reasonable consumer whether to invest; (3) un rebutted affidavit testimony by consumers corroborating the inference that the misrepresentations were highly material to the purchase decision; and (4) the absence of meaningful evidence by defendants to rebut the inference drawn from (1) - (3) that other consumers relied to their detriment. The court stated that the defendants'

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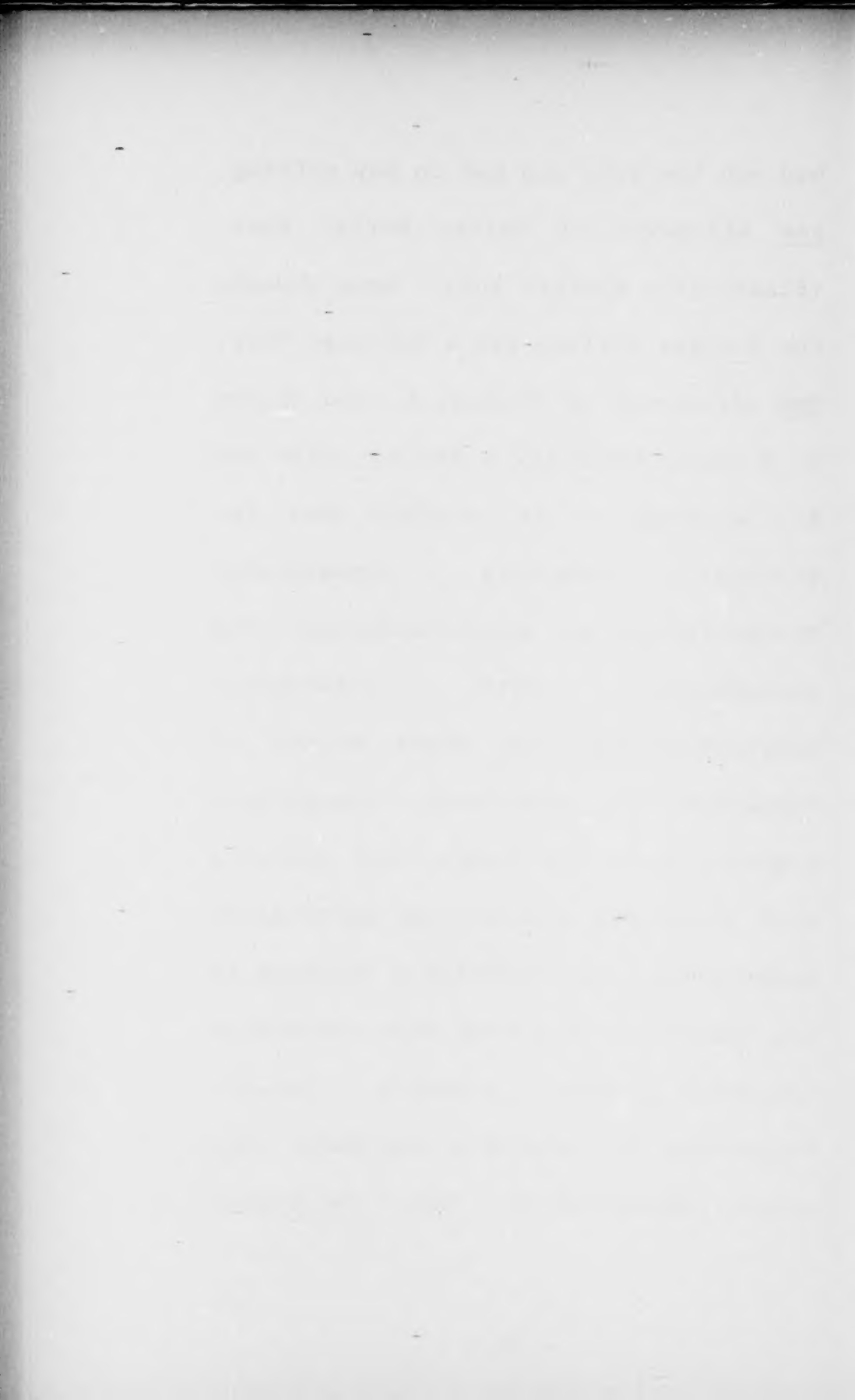
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failure to disclose material information was central to their deception and a material omission which justified an inference of reliance. Regarding the element of injury, the court held that representative proof of injury was sufficient in an FTC enforcement action, as opposed to a private action for fraud. U.S. Oil & Gas, slip op., at 48-49, citing Kitco and FTC v. International Diamond Corp., 1983-82 Trade Cas. (CCH) ¶ 65,506, 69,704 (N.D. Calif. 1983).

As the witnesses testified and as the affidavits and many complaints corroborated, many consumers were actually misled into thinking that the price of the voucher was the price of the vacation. Some thought that they



had won the trip and had to pay nothing,
see Affidavit of Walter Worley Fain,
(Plaintiff's Exhibit 108). Some thought
the Y-class airfare was a low cost fare.
See affidavits of Michael L. and Sharon
T. Foster (Plaintiff's Exhibit 103A and
B), although it is possible that in-
dividual consumers unreasonably
misunderstood or mischaracterized the
conversation with defendants'
representatives, the sheer volume of
complaints to defendants, charge-back
requests with the banks, and contacts
with state and federal law enforcement
authorities lends undeniable credence to
the Commission's claims that reasonable
consumers were actually misled.
Concerning Mr. Anolik's testimony that
since deregulation the reasonable



consumer would not be misled, little can be made of it. If in fact, as well established here, reasonable -- indeed some highly intelligent and sophisticated -- consumers were misled, one can only conclude that Mr. Anolik's high estimation of the public's discernment is not warranted. Moreover, he was asked or in a position to evaluate the deviations from the script which clearly misled many consumers.

3. The misrepresentations, omissions and practices were material to the transaction.

A misrepresentation is material if it goes to a fact that a reasonable person would regard as important in deciding on a course of action. Cliffdale, 013 F.T.C. at 165. The failure to disclose material information may cause

an advertisement to be deceptive even if it does not state false facts. Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1154 (9th Cir. 1984); Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658, 665 (2d Cir. 1979). The FTC need only prove that the alleged deceptive practices were the type of misrepresentations upon which a reasonably prudent person would rely, that the misrepresentations were widely disseminated, and that the injured customers actually purchased the product. Proof of actual materiality of an omitted fact through consumer testimony is unnecessary, as an inference of materiality may reasonably be made when a deceptive omission is found. U.S. Oil & Gas, slip op. at p.36, citing FTC v. ColgatePalmolive Co., 380 U.S. 374,

391-92 (1965). The burden then shifts to the defendants to prove that the misrepresentations were not relied on by the consumers. Kitco, 612 F.Supp. at 1293, citing International Diamond, 1983-82 Trade Cases (CCH) at 69,709.

The evidence leaves no doubt that in most instances the consumers whose testimony and affidavits were received in evidence would not have made the purchase had they known the actual price because the actual price was not the type of "deal" that would motivate a person to sign on over the telephone based on so little information. Even those who might have purchased based on price were misled to believe they had time to consider price and other items before purchasing when in fact they were

billed immediately. Obviously, it is a material omission to tell someone his credit card number is wanted for verification of credit when in fact the purpose was to take \$329.90 of his money. In sum, defendants have not met their burden to prove their misrepresentations were not relied on. There is no evidence of fact that a large number of others were misled. For these reasons, the court concludes that the defendant corporations have engaged in the alleged unlawful practices in violation of section 5(a) of the Act.

- B. The Commission has established that the individual defendants have committed deceptive acts in commerce.

We turn now to the issue of whether defendants McCann and Weiland have also

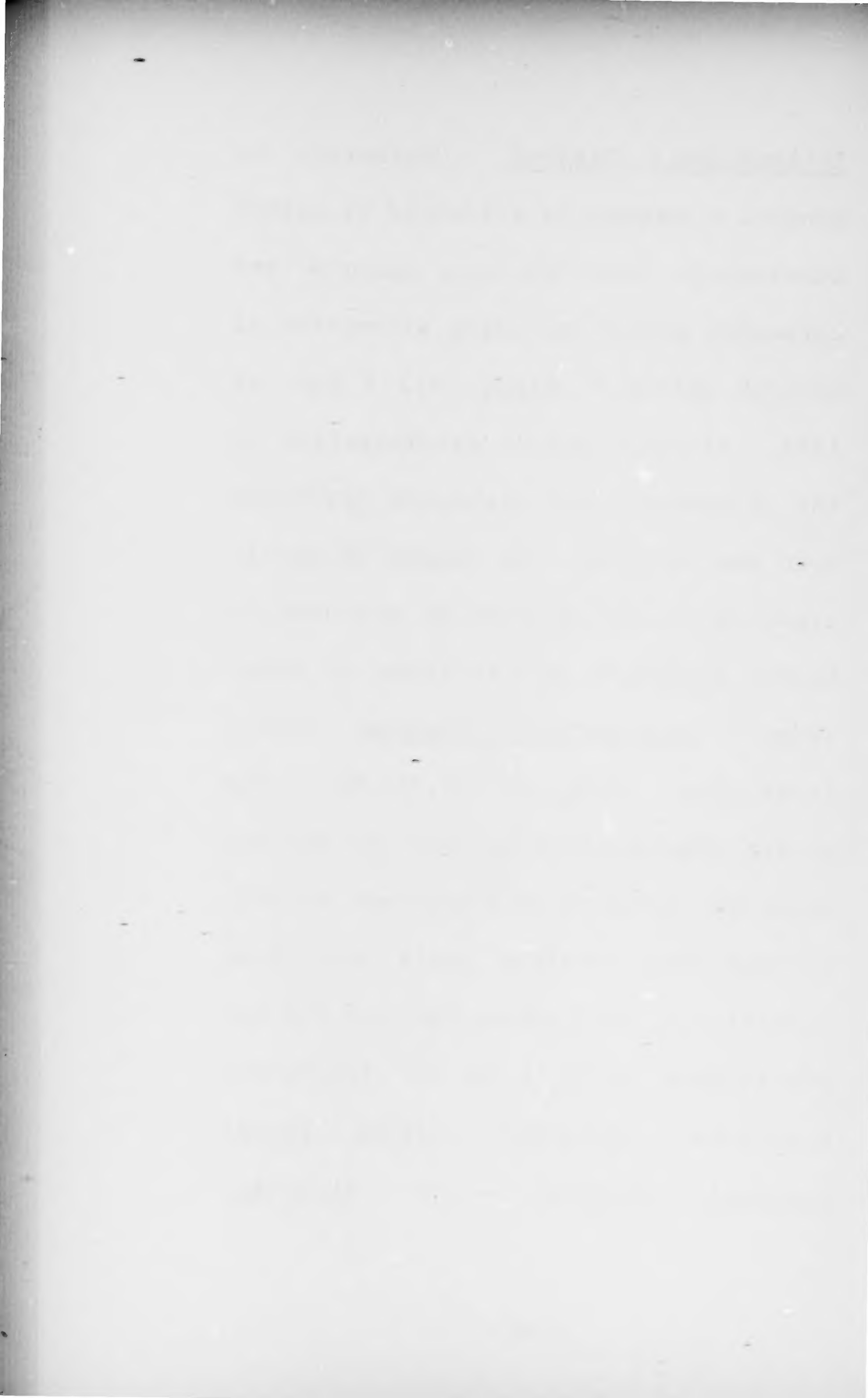
violated the Act. The law is clear on the issue of individual liability. The two key cases are Kitco, 612 F.2d at 1292 , and International Diamond, 1983-2 Trade Cas. (CCH) at 69,707709. These cases establish that an order requiring individual defendants to pay restitution to consumers for violations of law accomplished through their corporations is appropriate if the Commission shows (1) that the individuals knew that their companies or one or more of their agents engaged in dishonest or fraudulent acts or practices; (2) that the individual defendants either directly participated in the acts or practices or had the authority to control them; (3) that the misrepresentations or omissions employed in the fraudulent scheme were the type

upon which a reasonably prudent person would rely; and (4) the misrepresentations and omissions resulted in consumer injury. To meet the first element of this standard, it is enough to show either actual knowledge of the dishonest or fraudulent acts or practices, reckless indifference to the truth or falsity of the representations, or an awareness of a high probability of fraud, coupled with the intentional avoidance of the truth. Kitco, 612 F.2d at 1292; International Diamond, 1983-2 Trade Cas. (CCH) at 69,707.

Direct participation in the fraudulent practices is not a requirement for liability. Awareness plus failure to act within one's authority to control is sufficient. Atlantex, citing



- International Diamond. "Authority to control a company is evidenced by active involvement with business matters and corporate policy including assumption of officer duties." Kitco, 612 F.Sup. at 1292. Although direct participation in the fraudulent and dishonest practices need not be shown, the degree of participation in the conduct of business is highly probative on the issue of knowledge. International Diamond, 1983-2 Trade Cas. (CCH) at 69,707-08. The policy consideration is that one may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices. Atlantex, citing International Diamond. In Atlantex,



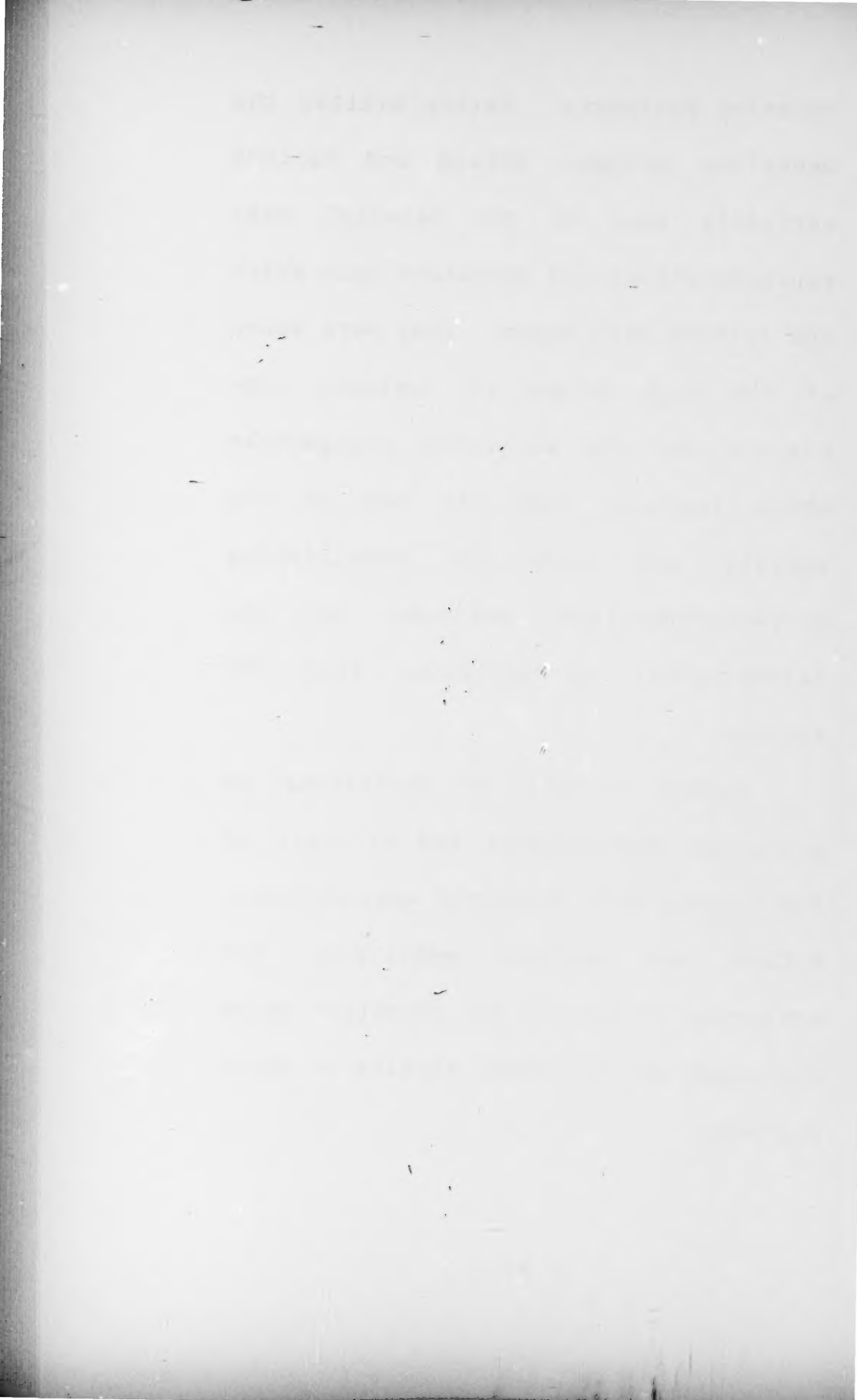
defendants were principals of the corporation and thus possessed authority to control the company's actions. One defendant was the head sales manager with authority to hire and fire and therefore had authority to control representations. The court found that the defendant corporation had passed along misleading information, and there was circumstantial evidence to establish the individual defendant's knowledge of the facts and of the corporation's activities, which he controlled. Therefore, whether defendant had actual knowledge of the misrepresentations being made in the sales floor outside his office, or whether he was merely aware of the high probability of fraud but intentionally avoided finding out

the truth, he was liable. Similarly, in WarnerLambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), the court stated that innocence of motive was not a defense if an advertisement was prejudicial to the public interest. Id. at 763, n.70.

The Commission has more than met its burden under this test. Although it appears that McCann and Weiland themselves did not make sales calls to consumers, the level of admitted participation by McCann and Weiland in the business more than adequately supports a finding that these individuals had knowledge of the practices at issue. McCann and Weiland designed and on a day-to-day basis oversaw the sales operation with the clear purpose of inducing consumer purchases of their

vacation passports. Having written the deceptive scripts, McCann and Weiland certainly knew of the material misrepresentations and omissions upon which the scripts were based. They were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the use of the scripts and from the embellishing misrepresentations employed by the telemarketers in deviation from the scripts.

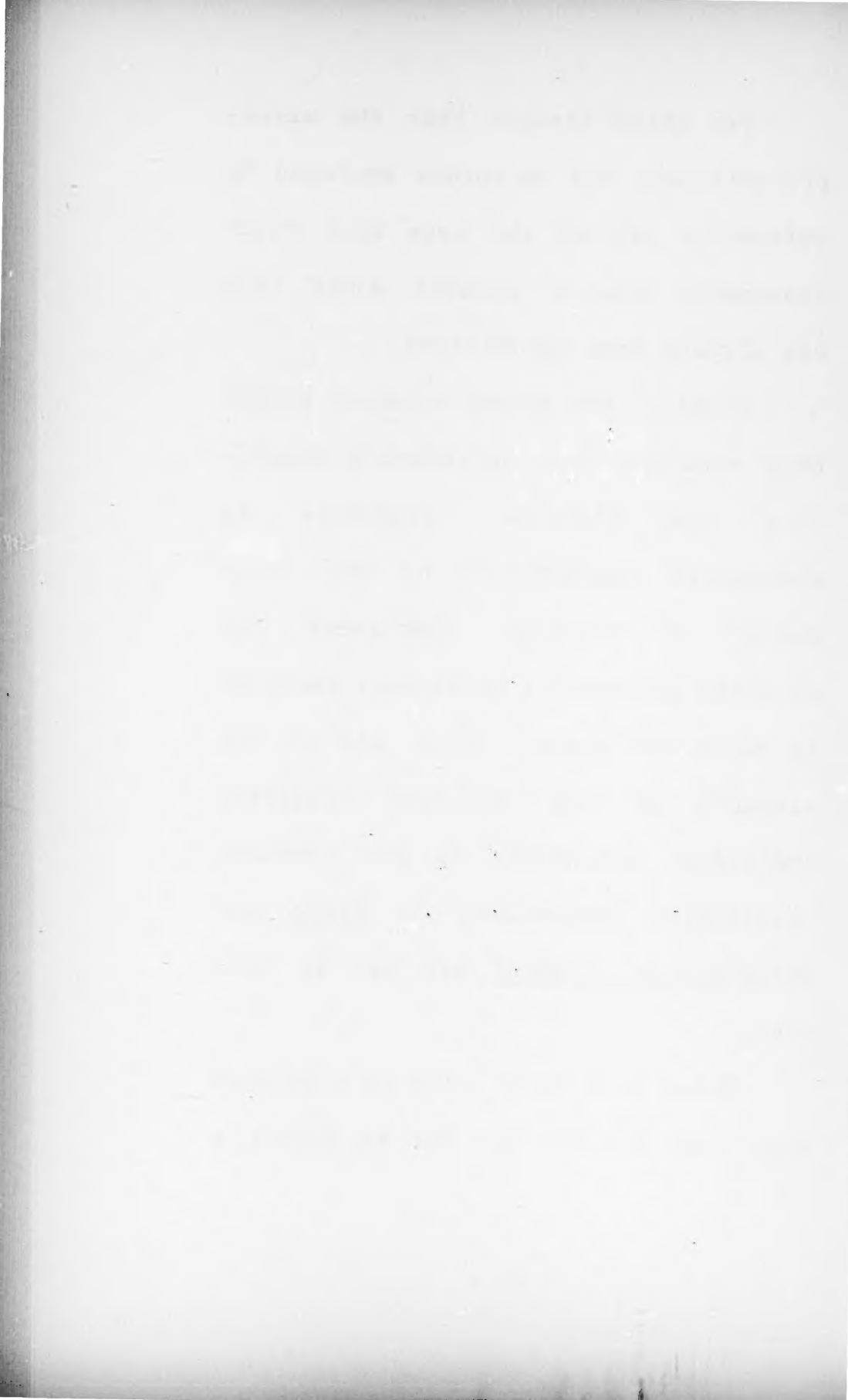
Second, by their own admissions, as principal shareholders and officers of the closely held defendant corporations, McCann and Weiland admittedly had authority to control the deceptive sales operation and all other aspects of their business.



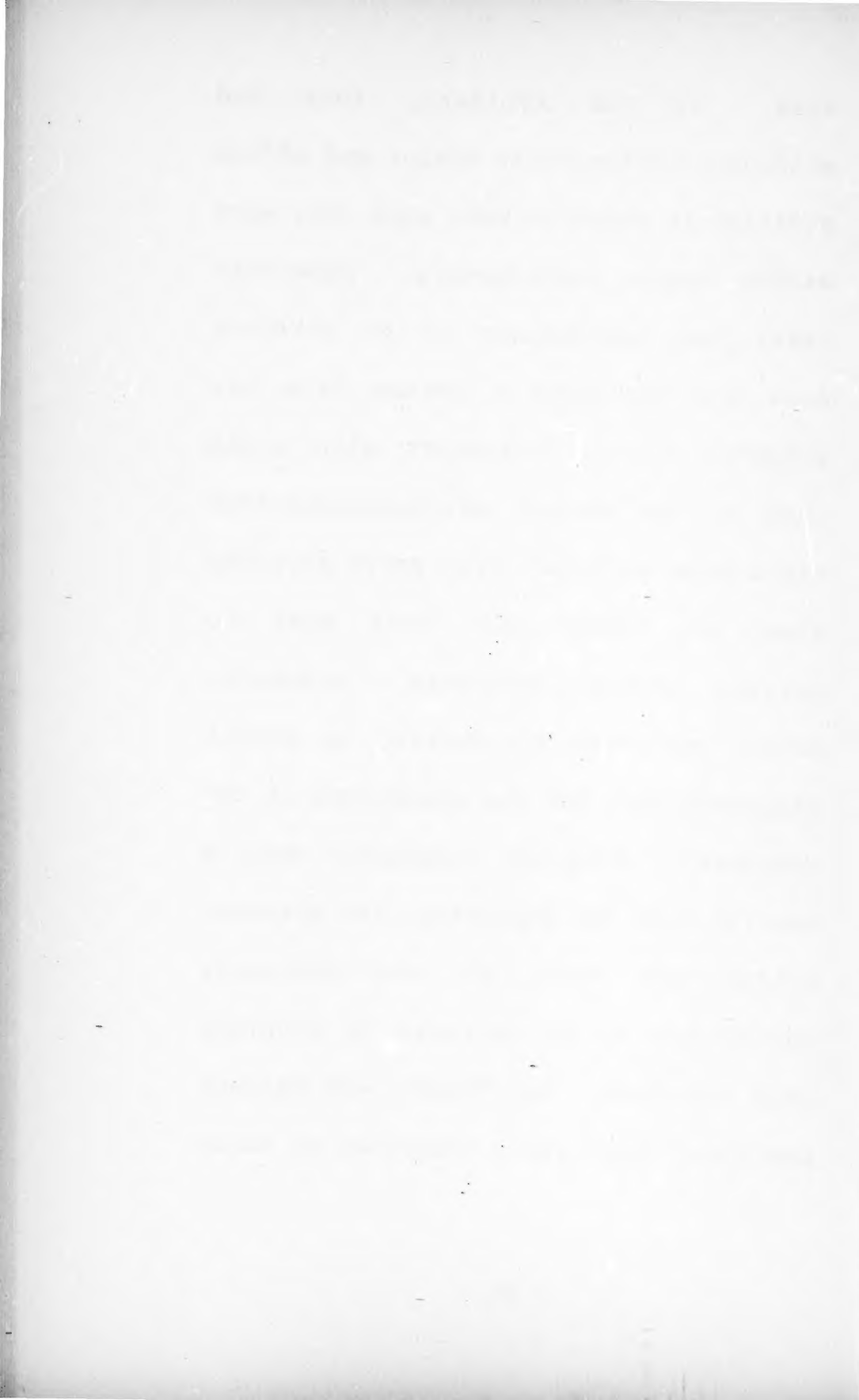
The third element that the misrepresentations and omissions employed by defendants are of the type upon which reasonably prudent persons would rely has already been established.

Finally, the actual consumer injury that resulted from defendant's fraudulent and dishonest practices is abundantly demonstrated by the large number of consumer complaints and requests for credits defendants received as discussed above. Thus, all of the elements of the standard requiring individual defendants to pay consumer restitution articulated in Kitco and International Diamond are met in this case.

These defendants offer as a defense that they did not set out to create a



scam. To the contrary, they had attorneys review their script and office policies in order to make sure they were within legal requirements. Nevertheless, the imprimature of an attorney does not exonerate a person from his unlawful acts. Defendants also claim that to the extent misrepresentations might have occurred, they never approved them but rather did their best to correct their employees' misdeeds. McCann and Weiland admitted to direct responsibility for the operations of the companies. Consumer complaints were a reality from the beginning, yet whatever action was taken it was obviously ineffective as no decrease in problems ever occurred. Yet McCann and Weiland continued their rapid expansion of sales

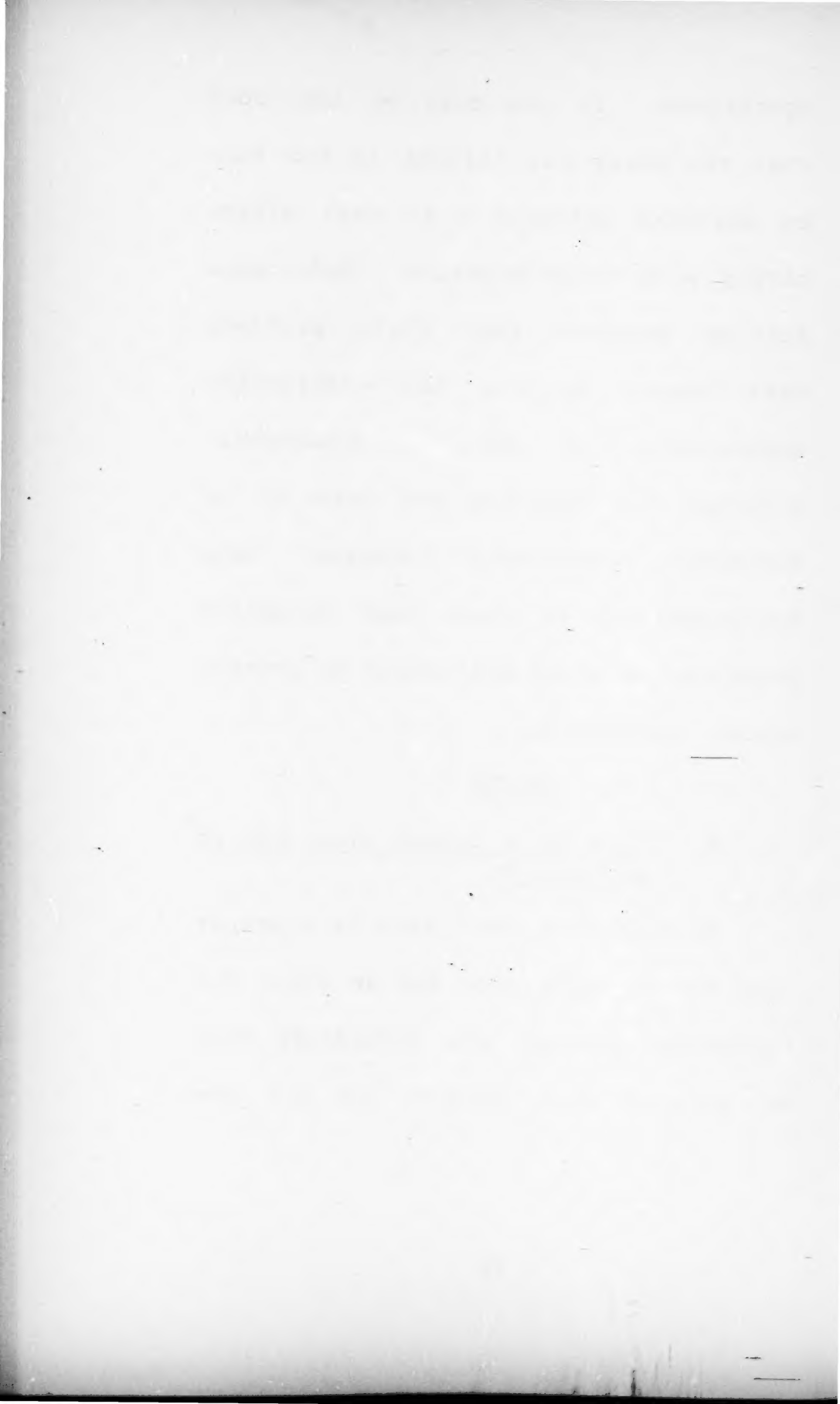


operations. It can only be concluded that the money was rolling in too fast to motivate defendants to deal effectively with these problems. Defendants further argument that their problems were caused by the law enforcement authorities is also unsustainable. Although the searches and seizures of documents undoubtedly impaired their functions, it is plain that deceptive practices occurred well prior to governmental interference.

RELIEF

- A. This is a proper case for an injunction.

As discussed above this is a proper case for an injunction and an order for injunction against all defendants will be entered with respect to all the



practices complained of, even though the corporations are currently inactive and Weiland and McCann are not engaged in this type of sales activity. The fact that illegal conduct has been discontinued does not render a controversy moot. Carter Products, Inc. v. FTC, 323 F.2d 523, 531 (5th Cir. 1963); Clinton Watch Company v. FTC, 291 F.2d 838, 841 (7th Cir. 1961). Further, no proof is required that the practices will be resumed. "Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned." P. F. Collier & Son Corp. v. FTC, 427 F.2d



261, 275 (6th Cir. 1970). This is such a case.

B. Rescission of contract and restitution is also an appropriate remedy for some consumers.

While it appears clear that the FTC does not have the power itself to compel restitution under its general cease and desist powers, see Heater v. FTC, 503 F.2d 321, 321-22 (9th Cir. 1974), the court does have the power to compel restitution. See FTC v. Evans Products Co., 775 F.2d 1084, 1087 n.1 (9th Cir. 1985); Baum v. Great Western Cities, Inc. & New Mexico, 703 F.2d 1197, 1208-09 (10th Cir. 1983). See also Singer supra., 668 F.2d at 1113 (rescission and restitution are within courts' ancillary equitable jurisdiction); FTC

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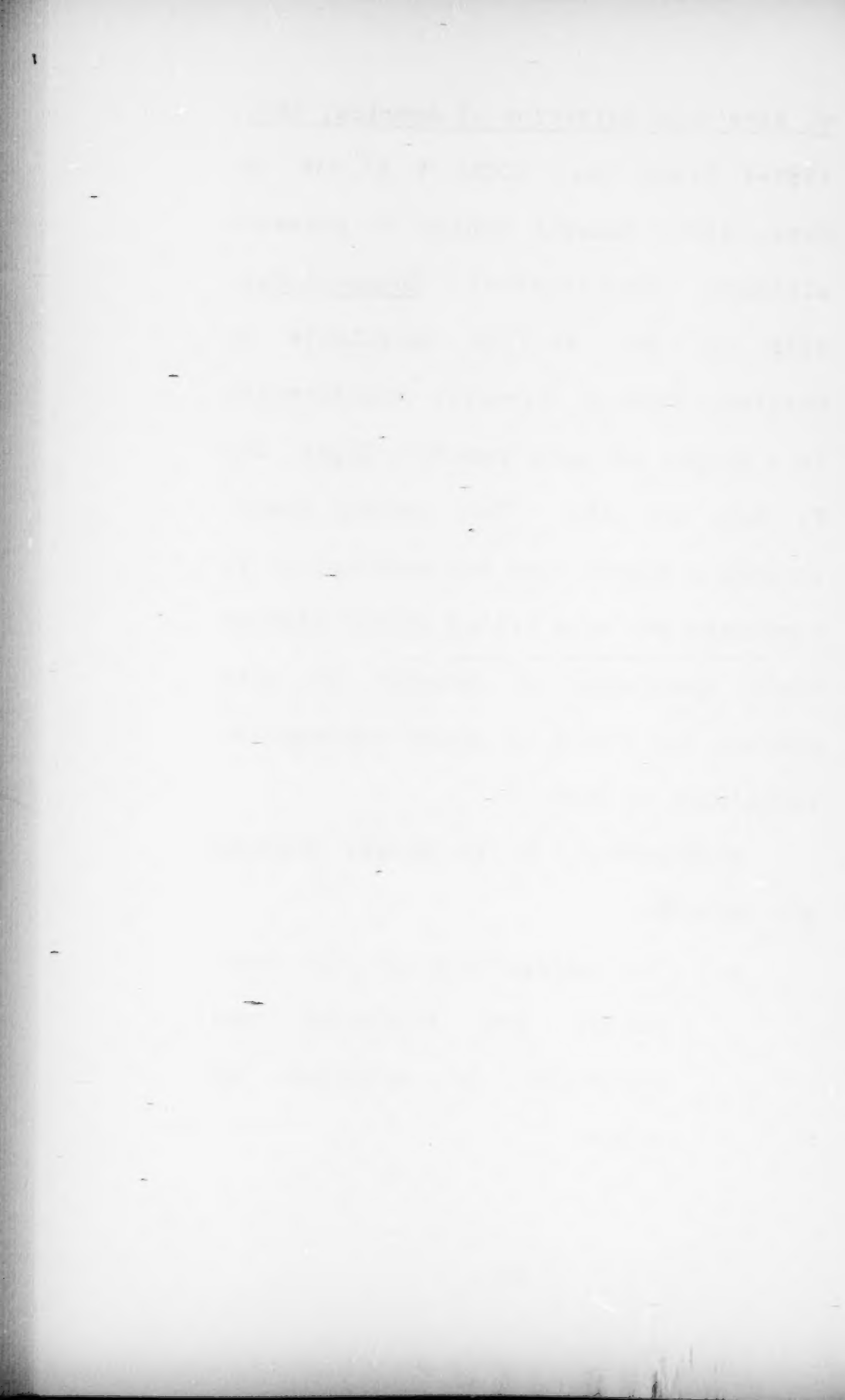
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v. Rare Coin Galleries of America, Inc.,
1986-2 Trade Cas. (CCH) ¶ 67,338 (D.
Mass. 1986) (assets frozen to preserve
ultimate restitution); Engage-A-Car,
slip op. No. 86-3758 (available on
Westlaw, FABR-CS Library) (restitution
is a proper ultimate remedy); Kitco, 612
F. Supp at 1291. This record demon-
strates a proper case for restitution to
consumers who were billed either without
their knowledge or consent or with
consent but based on false representa-
tions made to them.

ACCORDINGLY, IT IS HEREBY ORDERED
AND DECREED:

- A. The allegations of the com-
plaint are sustained and
plaintiff is entitled to
relief;



B. A final order of permanent injunction and restitution against defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Tele-marketing, Inc., Thomas P. McCann III, and James F. Weiland will be entered;

C. The Commission is directed to draft a proposed order for injunction and restitution consistent with this decision and to serve a copy of the draft on defendants by February 18, 1988. The parties are directed to resolve what differences they may have concerning the proposed order and to submit

the proposed order to the court not later than February 25, 1988. Defendants shall file any objections concerning terms which the parties have been unable to resolve by that date, also. An injunction will be entered promptly thereafter.

ENTER:

JOAN HUMPHREY LEFKOW
United States Magistrate

Date: February 10, 1987

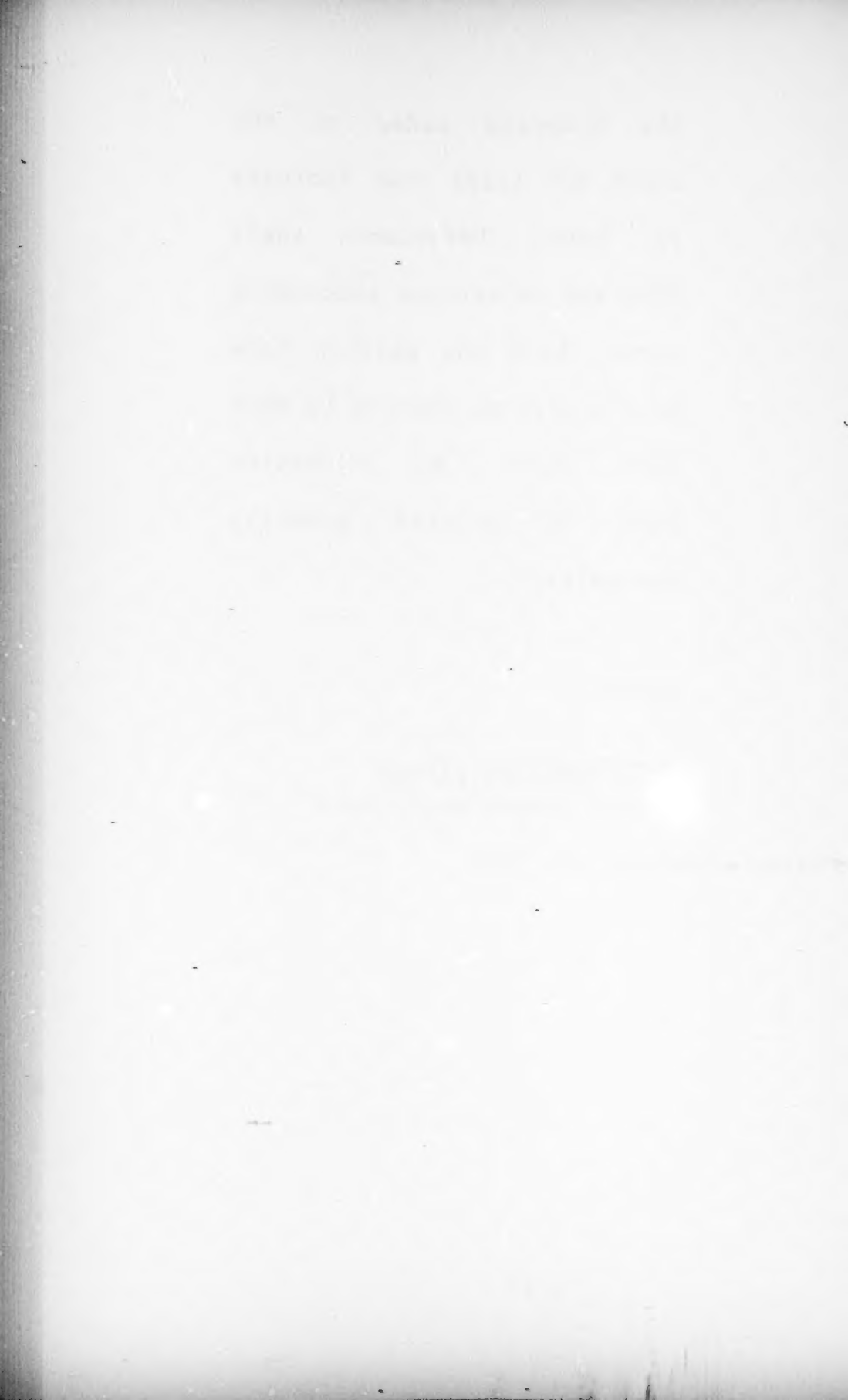


EXHIBIT 2



IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE §
COMMISSION §

Plaintiff §

vs. §

NO. 87 C 6776

AMY TRAVEL §

SERVICE, INC. §

INC., RESORT §

PERFORMANCE, INC., §

RESORT TELE- §

MARKETING INC., §

THOMAS P. MCCANN, §

III, AND §

JAMES F. WEILAND §

Defendants. §

FINAL ORDER OF PERMANENT INJUNCTION AND
RESTITUTION

This action having been tried and
Findings of Fact and Conclusions of Law
having been entered on February 10,
1988;

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

MEMORANDUM FOR THE DIRECTOR

DATE: 10/10/68

TO: DIRECTOR, FBI
FROM: SAC, NEW YORK
SUBJECT: [Illegible]
RE: [Illegible]

[Illegible body text]

IT IS ORDERED AND DECREED that defendants Amy Travel Service, Inc. Resort Performance, Inc., Resort Tele-marketing, Inc., Tthomas P. McCann III, and James F. Weiland, and each of them and their officers, agent, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, directly, or through any corporation or other device, in connection with the sale or offering for sale of any "Vacation Passport" or any oral or written agreement to provide vacation or travel services, be and are hereby permanently enjoined from the following:

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
IN TWO VOLUMES
BY NATHANIEL BENTLEY
OF THE BOSTON BAR
VOL. I.
BOSTON: PUBLISHED BY
J. B. BENTLEY, 1822.

A. Making, or assisting in the making of, directly or by implication, orally or in writing, any representation that

1. Purchasers of such Vacation Passports or other oral or written agreements to provide vacation or travel services are entitled to fully paid vacations, including roundtrip airfare and hotel lodging, for a stated price, if, in actual fact, purchasers are required to pay additional sums in order to obtain a vacation;

2. A prospective purchaser must provide his or her credit card number for the purpose of



verifying th the purchaser's eligibility, or for any other purpose other than to bill charges to the prospective purchaser's account.

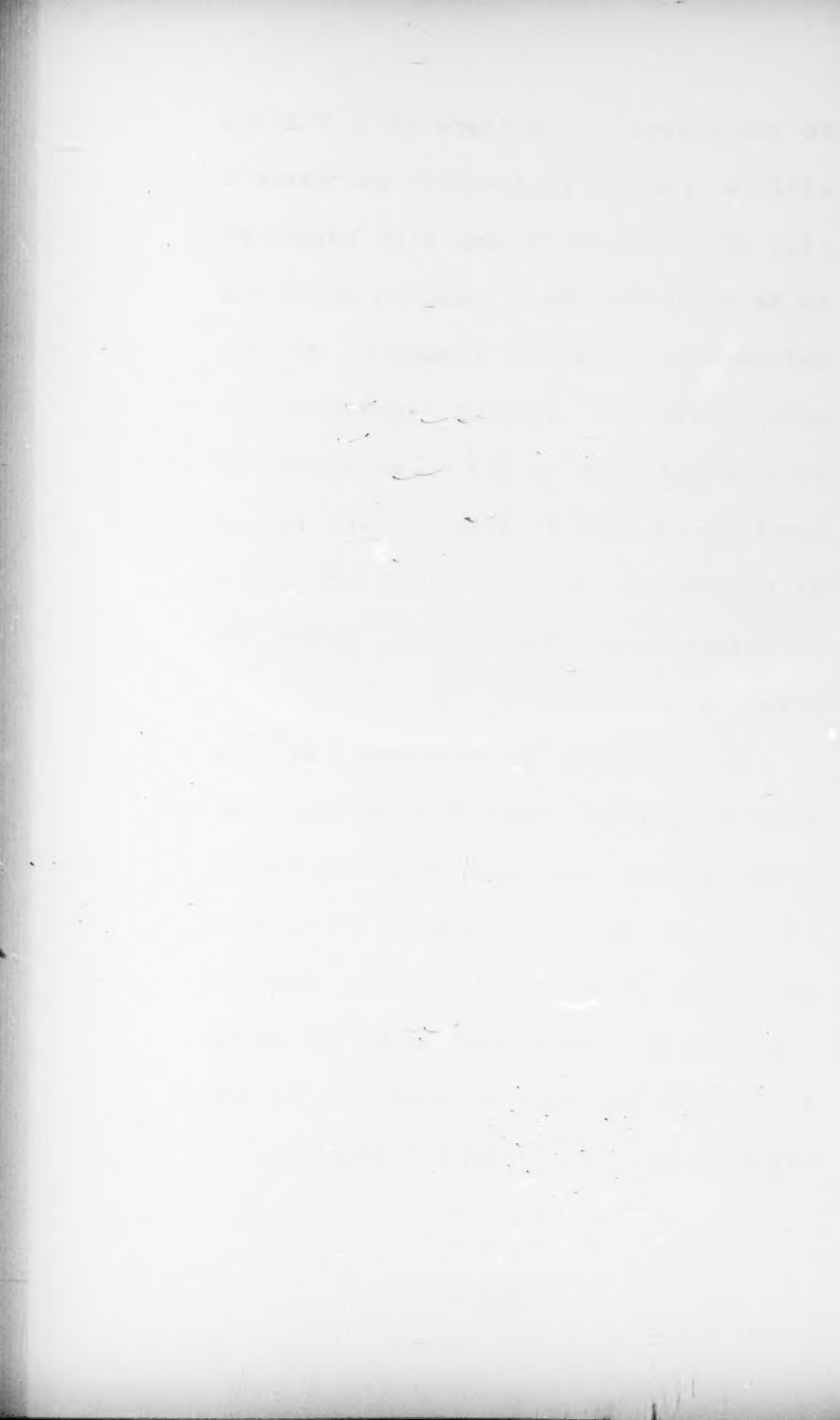
B. Billing charges for any Vacation Passport or any other oral or written agreement to provide vacation or travel services, or billing any other charge to any credit card account without the account owner's express authorization to bill the exact amount charged to the owner's account.

C. Failing to disclose, at the time of initial contact with any prospective purchaser, and in any follow-up contact by telephone or written materials, the actual cost within seven days prior to, or on the day of, the contact



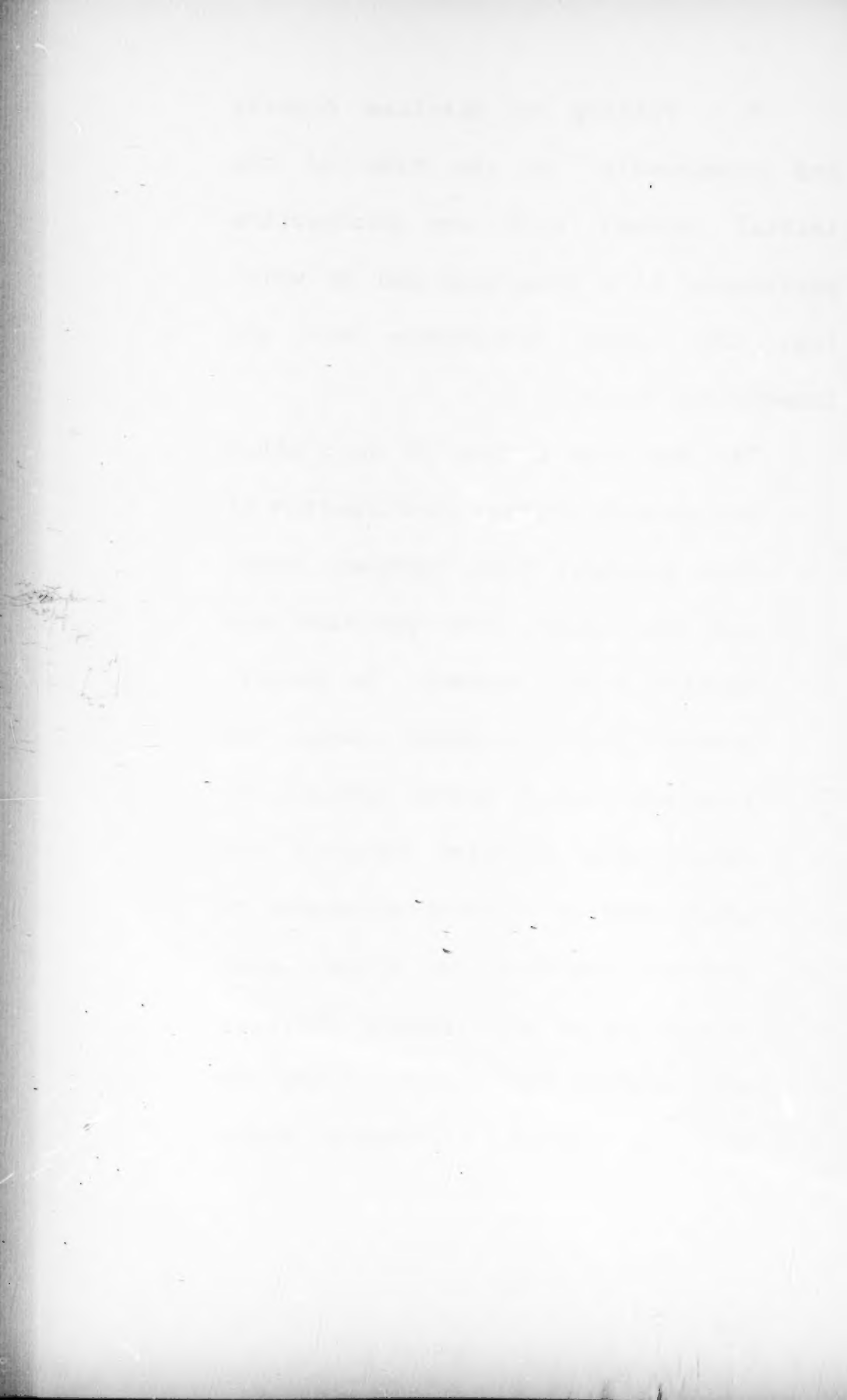
to purchasers, in dollars of a Y-class airfare from the prospective purchaser's city of residence to any site purported to be available for a vacation under the defendant's Vacation Passports or any other oral or written agreement to provide vacation or travel services, if purchase of such Y-class airfare is, or is represented to be, a condition that a purchaser must fulfill in order to obtain a vacation.

D. Failing to disclose, at the time of initial contact with any prospective purchaser, and in any follow-up contact by means of telephone or written materials, the cost in dollar amounts that the purchaser must incur in order to fulfill any term or condition of any offer in order to receive a vacation.



E. Failing to disclose clearly and prominently, at the time of the initial contact with any prospective purchasers by a telephone and in writing, the exact statements set out immediately below:

"At any time within 30 days after you receive written confirmation of your purchase from (company name) you may cancel your purchase and receive a full refund. To cancel, simply call (company name) at (company toll-free 800 number), or return your Vacation Passport (or other oral or written agreement to provide vacation or travel services) to us at (company address) with a short explanation of why you wish to cancel. (Company name)



will promptly process a full credit to your account".

F. Failing to disclose clearly and prominently in any printed or written material sent to any purchasers or prospective purchasers of any Vacation Passport or other written or oral agreement to provide vacation or travel services the exact statements set out in Paragraph E above, in type of at least 12 points in size.

G. Failing to process and transmit to the appropriate credit card issuer a full credit to the purchaser's account for the amount billed to the purchaser's account by defendants within seven (7) business days of receipt of notice from any purchaser of any Vacation Passport or other written or oral agreement to

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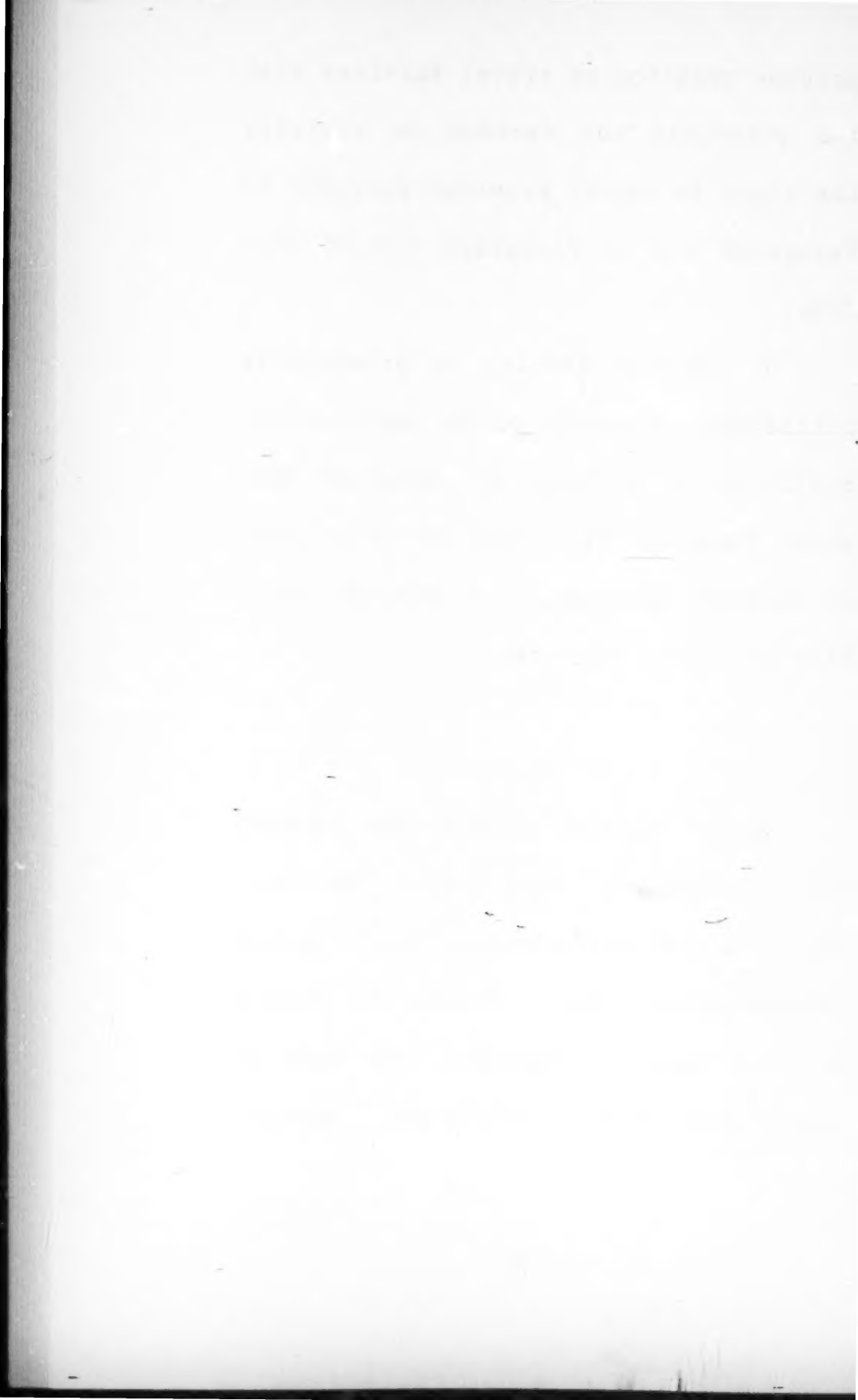
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provide vacation or travel services that the purchaser has decided to exercise the right to cancel provided pursuant to Paragraph I.E or Paragraph I.F of this Order.

H. Misrepresenting to prospective purchasers, directly or by implication, orally or in writing, any material fact about Vacation Passports or other oral or written agreements to provide vacation or travel services.

II.

IT IS FURTHER ORDERED AND DECREED that defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them and their officers, agents,



servants, employees and attorneys, and those persons on active concert or participation with them who receiver actual notice of this Order, by personal service or otherwise, directly or through any corporation or other device, be and are hereby permanently enjoined, in the sale of any product or service, from the following:

A. Misrepresenting, directly or by implication, the price of such product or service;

B. Failing to disclose to prospective purchasers all material costs of such product or service;

C. Making a credit card charge or in any other manner billing any person for such product of service without such person's knowing authorization:

D. Failing to provide written confirmation of any sale to a purchaser within ten days of sale.

III.

IT IS FURTHER ORDERED AND DECREED that Defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them, shall jointly and severally pay to the Federal Trade Commission the sum of \$6,629,100⁴ in redress for their

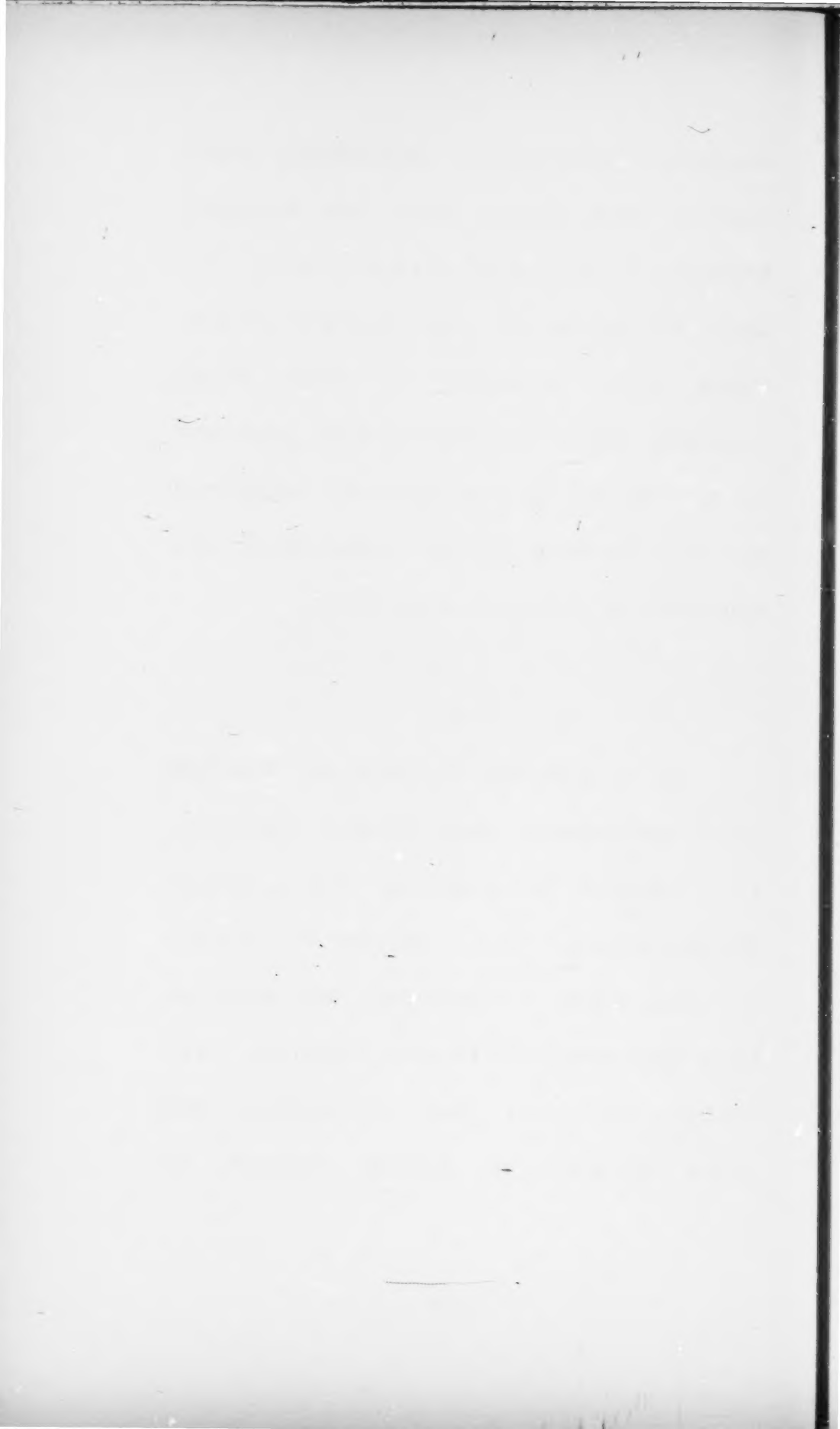
⁴ This amount has been derived as stated in open court on May 2, 1988, based on the estimated number of consumers who purchased passports and requested vacations but did not travel (17,406) plus the estimated number who requested refunds but did not receive them (4,691), multiplied by \$300.



deceptive practices. Defendants shall deposit such monies into the Registry Account of the Court within thirty (30) days of entry of the Court's Order. Funds paid pursuant to this Final Judgment shall be distributed pursuant to a plan to be subsequently submitted by the Federal Trade Commission and approved by order of this Court.

IV.

IT IS FURTHER ORDERED AND DECREED that defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them and their officers, agents, servants, employees and attorneys, and those persons on active concert or



participation with them who receive actual notice of this Order, by personal service or otherwise, directly or through any corporation or other device, be and are hereby permanently enjoined from :

A. Transferring, selling, alienating, liquidating, encumbering, pledging, loaning, assigning, concealing, dissipating, converting, withdrawing or otherwise disposing of assets, funds, real property or other property, wherever located, owned or controlled by, in whole or in part, or in the possession of any defendant, except as required by Section III of this Order or as allowed by further Order of this Court;

B. Failing to create and maintain books, records, and accounts which, in



reasonable detail, accurately, fairly and completely reflect the incomes, disbursements transactions and use of monies by defendants; and

C. Destroying, erasing, mutilating, concealing, altering, transferring or otherwise disposing of, in any manner, directly or indirectly, any computer tapes, discs or other computerized records, books, written or printed records, correspondence, diaries, handwritten notes, telephone logs, telephone scripts, advertisements, receipt books, ledgers, personal and business cancelled checks and check registers, bank statements, appointment books, day books, copies of federal, state or local business or personal income or property tax returns, any type



of notices transmitted or to be transmitted by defendants or their agents to a credit card issuer that cause a consumer's account to be debited in the course of credit card sales by telephone, and other documents or computerized records of any kind which relate to the business practices or business or personal finances of any of the defendants.

V.

IT IS FURTHER ORDERED AND DECREED that any bank, savings and loan institution, credit union, financial institution, brokerage house, trustee, or any other person having custody or control of any accounts or other assets, owned directly or indirectly of record or



beneficially by defendants Amy Travel Service, Inc., Resort Performance, Inc. Resort Telemarketing, Inc., Thomas P. McCann III. and James F. Weiland, or any of them, shall within thirty days of service of this order sell or liquidate such account or asset and remit the proceeds of such sale liquidation to the Clerk of the Court for deposit into the Registry Account of the Court.

VI.

IT IS FURTHER ORDERED AND DECREED that for purposes of determining or securing compliance with this Order an subject to any legally recognized privilege, defendants, in connection with any business organization owned, managed or controlled in whole or in



part by a defendant and engaged in the telephonic sale of goods or services to consumers shall permit, upon reasonable written notice to defendants, for a period of five years, representatives of the Federal Trade Commission:

A. Access during normal office hours to the offices of defendants to inspect and copy all documents in the possession or under the control of defendants relating to compliance with the terms of this Order; and

B. Subject to the reasonable convenience of defendants and without restraint or interference from them, to interview, at a location reasonably convenient to both defendants and the Federal Trade Commission, the officers and employees of any such business



organization, who may have counsel present, relating to compliance with the terms of this Order.

VII.

IT IS FURTHER ORDERED AND DECREED that Thomas P. McCann III and James F. Weiland, for a period of five years from entry of this Order, promptly give written notice to the Federal Trade Commission at the following address:

Federal Trade Commission

Associate Director for

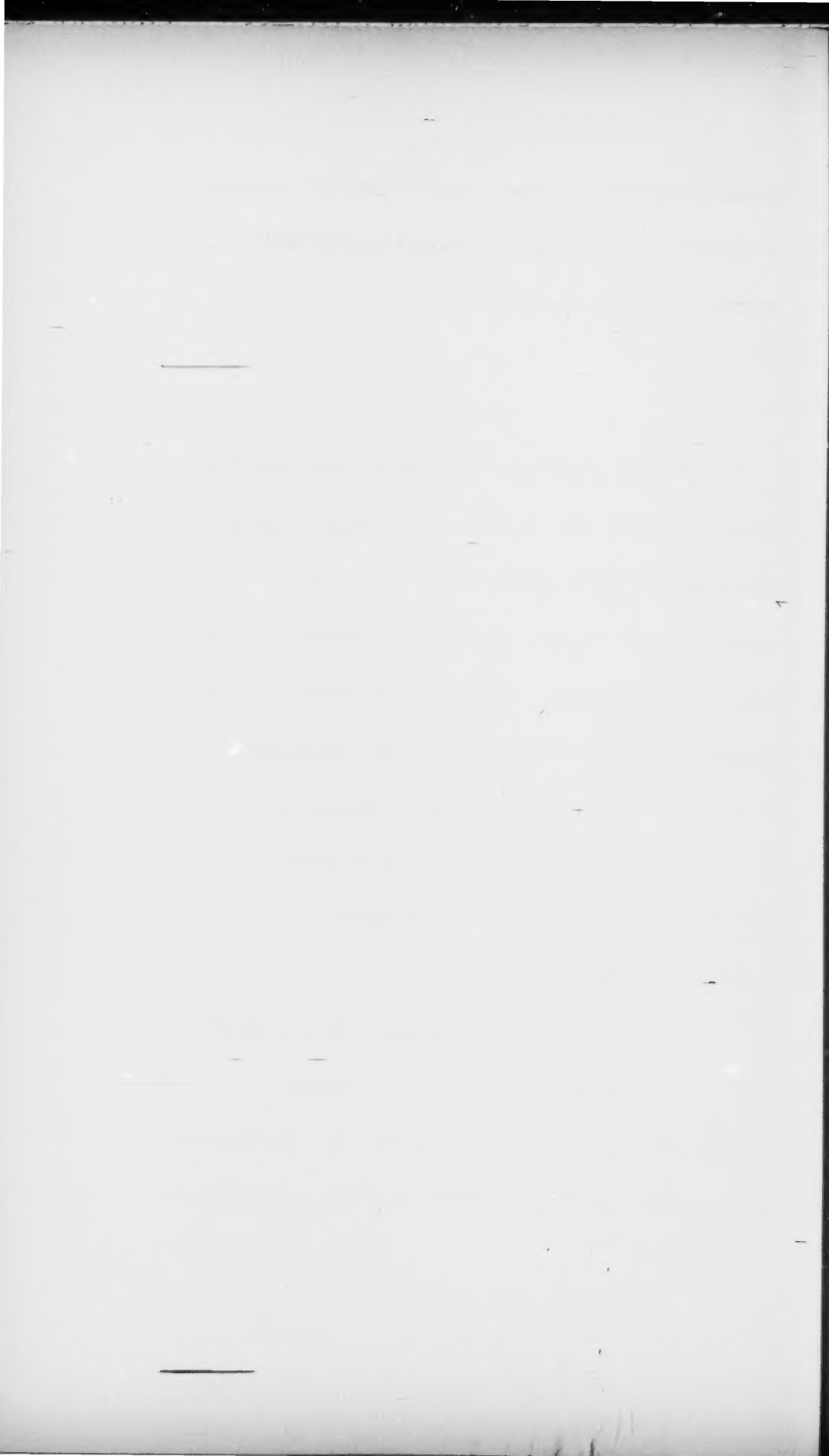
Marketing Practices

Room 238

6th St. and Penn. Ave., N.W.

Washington, D.C. 20580

of each affiliation with a different business or employment whose activities



include the sale of any product or service to the public. Such notice shall include the new business's name and address, a statement of the nature of the business, and a statement of his duties and responsibilities on connection with the business.

VIII.

IT IS FURTHER ORDERED AND DECREED that the expiration of any requirement imposed by this Order shall not effect any other obligation arising under this Order.

IX.

IT IS FURTHER ORDERED AND DECREED that Thomas P. McCann III and James F. Weiland shall, within sixty (60) days



after service upon them of this Order, file with the Commission and the Court a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

X. -

IT IS FURTHER ORDERED AND DECREED that the Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED, this fourth day of May, 1988.

ENTER:

JOAN HUMPHREY LEFKOW

United States Magistrate



EXHIBIT 3



In the
United States Court of Appeals
For the Seventh Circuit

No. 88-1997

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AMY TRAVEL SERVICE, INC.,
RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.,
THOMAS P. McCANN, II, and
JAMES F. WEILAND,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-C-5776—Joan H. Lefkow, Magistrate.

ARGUED NOVEMBER 9, 1988—DECIDED APRIL 19, 1989

Before CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* The defendants in this case are three corporations and two individuals. The corporations are Amy Travel Service, Inc. ("Amy"), Resort Telemarketing, Inc. ("RTI"), and Resort Performance, Inc. ("RPI"). The individuals, Thomas P. McCann II ("McCann") and James F. Weiland ("Weiland"), were the owners and directors of the defendant corporations. These

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companies market discount vacations through the sale of "vacation certificates" or "vacation passports." The Federal Trade Commission ("FTC") filed suit to enjoin defendants' allegedly deceptive trade practices. The FTC also asked for rescission of contracts and restitution to consumers. The case was tried by consent to a magistrate, who found for the FTC. The magistrate entered a permanent injunction, ordered restitution, and imposed personal liability on the individual defendants. Defendants filed this appeal, questioning the power of the court to order such remedies and alleging other errors below.

1. FACTUAL BACKGROUND

This is an appeal from a final judgment and this court has jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 15 U.S.C. § 53(b). We will detail the findings of fact made by the district court to present the necessary backdrop for this appeal.

A. "This is not a sales call, so please relax . . ."

The defendant corporations and defendants Weiland and McCann were in the business of selling travel certificates (also known as "vacation passports" or "vacation vouchers"). In 1985, Weiland and McCann incorporated RPI as an Illinois corporation to market travel certificates. In 1986, McCann, Weiland, and two others opened a "tele-marketing" sales room in Indianapolis, Indiana to sell "vacation passports" over the telephone. This business operated under the name of RTI, an Indiana corporation. As their business increased, McCann and Weiland opened eight other phone sales rooms in Texas, Illinois, Colorado, and Kentucky.¹ All of the businesses were wholly-owned

¹ The Texas operations were incorporated as Resort Telemarketing of Texas, Inc. ("RTI Texas") and Texas Communications 7 Travel, Inc. ("TCT"). The Illinois phone rooms were incorporated

(Footnote continued on following page)



subsidiaries of RTI. McCann and Weiland managed all the businesses and they were all operated as a single entity. Defendant Amy was purchased in 1985 to fulfill vacation certificate travel obligations.

The defendants used telemarketing to sell vacation packages. The service provided was similar to that performed by a conventional travel agent—the assembly of a vacation package that included air transportation and lodging at a resort area—but the method used to sell the packages was quite different than the norm in the travel industry. Defendants assembled written materials that they called a “vacation passport” and sold the passports to consumers for \$289 to \$329. The passport consisted of two pages of written material and it contained written descriptions of the vacation package being offered. The passport listed nine resort destinations and identified RPI and Amy as the presenters of the offer. The passport stated:

This Passport entitles the adult holder(s) to receive *two round-trip air tickets plus lodging* for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare. Single adult travelers are entitled to the identical benefits for 50 per cent of the unrestricted Y-class fare.

The passport also detailed reservation procedures, including a requirement that all travel arrangements be made through Amy. On the back side of the passport, under the caption “Amy Travel Service Inc.,” there was a form allowing the purchaser of the passport to select three alternate destinations and departure dates. Finally, the passport included a statement that Amy “guaran-

¹ *continued*

as American Consumers Marketing, Inc. (“ACMI”) and National Consumers Marketing, Inc. The Colorado rooms were incorporated as Resort Telemarketing of Colorado, Inc., National Travel Brokers, and Travel Excellence, Inc. The Kentucky room operated as Consumers Power, Inc.



tees the lowest price of your itinerary or will pay you triple the difference in cash."

To facilitate sales of the passports over the phone, McCann and Weiland developed a "script" to be used by the telephone salespeople. The basic script² includes language

² Plaintiff's Exhibit 7 is an example of the scripts developed by the defendants. Defendants admit that this is one of their scripts.

TEXAS COMMUNICATIONS & TRAVEL, INC.

HI, MY NAME IS _____ WITH T.C.&T. OF HOUSTON, TEXAS. HOW ARE YOU TODAY? GREAT!!!! MR./MRS./MS. _____, THE REASON I AM CALLING, IS YOU HAVE BEEN *COMPUTER SELECTED* TO BE OFFERED A *SPECIAL*, VACATION VOUCHER TO *HAWAII* FOR ONLY \$329.90! THIS IS BEING OFFERED TO *LESS* THAN 1% OF ALL THE CREDIT CARD HOLDERS IN THE U.S.

AT THAT PRICE, I'M SURE YOU'D LIKE TO GO, HOWEVER, I DO HAVE TO ASK SOME QUALIFYING ?S FIRST. PROBABLE QUESTIONS: (1) WHY SO CHEAP? (2) WHAT'S THE CATCH? (3) WHAT DO I DO TO QUALIFY?

(REGARDLESS OF QUESTIONS, THE ANSWER IS:)

FIRST, MR./MRS./MS. _____, LET'S SEE IF YOU QUALIFY.

1. YOU ARE 21 OR OVER, AREN'T YOU?
2. YOU ARE STILL A MASTERCARD OR VISA CARD HOLDER, AREN'T YOU?
3. YOU DO PLAN TO TAKE A VACATION WITHIN THE NEXT *12 MONTHS*, DON'T YOU?
4. WHEN YOU TAKE YOUR VACATION, IF THE ACCOMMODATIONS WERE COMPLETELY PAID FOR, WOULD YOU TAKE SOMEONE WITH YOU?
5. AFTER YOU HAVE ENJOYED YOUR VACATION, WOULD YOU SEND US THE NAMES OF 3 FRIENDS WHO WOULD LIKE TO TAKE A *SIMILAR VACATION*, IF THEY WERE UNDER NO OBLIGATION?

I'M GLAD YOU SAID (YES) TO THOSE QUALIFICATIONS. . . . NOW I CAN TELL YOU WHAT WE CAN DO FOR YOU, AND WHY WE CAN OFFER YOU THIS WONDERFUL VACATION PACKAGE AT SUCH A LOW PRICE!

(Footnote continued on following page)



intimating that the offer was being made to only a few special customers. The customer must "qualify" for the offer by answering yes to a few simple questions. While the price of the voucher varied from \$289 to \$329, the price of the airfare that the prospective traveler also needed to purchase was never given. Customers were only told that the cost of the voucher entitled them to a fully paid vacation for eight days and seven nights plus two round trip

² *continued*

WE HAVE TESTED THE FEASIBILITY OF TELEPHONE MARKETING, AND THE RESULTS HAVE BEEN SO GREAT THAT WE HAVE BEEN ALLOWED TO CONTINUE TO OFFER THIS SPECIAL VACATION PACKAGE TO PREFERRED PEOPLE LIKE YOU.

MR./MRS./MS. _____, FOR ONLY \$329.90, YOU WILL RECEIVE YOUR VACATION VOUCHER, WHICH ENTITLES YOU TO A FULLY PAID VACATION FOR 8 DAYS AND 7 NIGHTS FOR (2) PEOPLE AT A BEAUTIFUL RESORT HOTEL, PLUS 2 ROUND TRIP AIRFARES, FOR A COST NOT TO EXCEED (1) UNRESTRICTED ECONOMY AIRFARE.

BY USING YOUR MASTERCARD OR VISA, YOU WILL RECEIVE YOUR VACATION VOUCHER WITHIN 7 TO 10 DAYS, OR SOONER.

AS A PREFERRED CUSTOMER. . . WOULD YOU RATHER USE MASTERCARD OR VISA . . .

(SHUT UP!!!!!!!!!!!!!!)

(WHEN YOU HAVE INTEREST, READ THIS RECAP) WHAT YOU ARE PURCHASING TODAY WITH YOUR CREDIT CARD IS A VACATION PASSPORT FOR \$329.90. THIS PASSPORT ENTITLES YOU TO 2 ROUND TRIP AIR TICKETS, PLUS LODGING FOR 8 DAYS AND 7 NIGHTS FOR 2 PEOPLE AT A RESORT HOTEL, FOR A COST NOT TO EXCEED 1 UNRESTRICTED ROUND TRIP, (Y-CLASS) FULL ECONOMY AIRFARE.

CLOSING: WHAT IS THE EXPIRATION DATE? HOW DOES THAT # READ? OK, WHILE I'M GETTING YOUR AUTHORIZATION #, I WOULD LIKE TO HAVE MY MANAGER VERIFY EVERYTHING I HAVE SAID TO YOU.

9714 OLD KATY ROAD, SUITE 212, HOUSTON, TEXAS 77055

12/8/86



airfares for a cost not to exceed one "unrestricted round trip (Y-class) full economy airfare." Customers were asked to provide their Mastercard or Visa numbers. After the script was read, the salesperson gave the phone to a supervisor who then read a document known as the "Purchaser's Acknowledgement Agreement" over the phone to the customer. This "agreement" purported to explain the details of the purchase and included a statement that

with your credit card purchase . . . for the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the voucher.³

³ The wording of the Purchaser's Acknowledgment Agreement varied, but Plaintiff's Exhibit 7-2 provides an example:

PURCHASER'S ACKNOWLEDGEMENT AGREEMENT

1. With your credit card purchase of \$329.90 for the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the voucher. In other words, for the cost of one airfare, the travel agency will provide both airline tickets and 8 days and 7 nights for two people, plus they do all the work. You have eight locations to choose from. They are . . . ACAPULCO, JAMAICA, FLORIDA, BAHAMAS, HAWAII, LAS VEGAS, COLORADO, or LONDON.
2. The travel agency's guarantee to you is: They guarantee you the lowest cost of your vacation itinerary, including both airfares and lodging for two people or they will pay you triple the difference in cash if you can find the same lodging as we offer and the same airfares for a lesser amount.
3. Your vacation passport is non-cancellable nor redeemable for cash. However, it may be transferred to another adult of your choice at no penalty. They must understand, however, that in order to take advantage of the program they must pay the equivalent, not to exceed, one round trip, standard, all year, full economy (Y-class) airfare.

(Footnote continued on following page)

A copy of this agreement was sent to the customer along with the vacation voucher.

The magistrate found that the procedure we have described was not always followed to the letter. The magistrate examined other exhibits provided by the FTC that showed how the defendants and their sales staff had departed from the standard script. Plaintiff's Exhibit 2, for example, begins:

Hi! My name is _____, I'm calling you with T.C.&T., I'm calling from Texas. This is *not* a sales call so please relax. The reason I am calling Mr./Mrs./Ms. _____, is this, you have been computer selected thru a major credit card company to be offered a *fully paid vacation to Hawaii*, for only \$289.90. . . . We are testing the feasibility of telephone marketing for an INTERNATIONAL TRAVEL AGENCY. While we are doing this pilot program, they have given us a *VERY LIMITED AMOUNT OF* these *SPECIAL* priced vacations to offer.

Defendants conceded that there was no limit on the number of vouchers available. The magistrate noted that while

³ *continued*

4. Your vacation passport will be processed and mailed to you within the next few days. The travel agency will need to receive your completed travel request form at least 45 days in advance of your requested departure date. The voucher is good through _____ 19____.
5. Your point of departure will be from any major airport serving all major cities in the continental United States.
6. You have agreed to furnish Texas Communication & Travel, Inc. with the names of three referrals either before or after you have taken your vacation. Your referrals are under no obligation to purchase.
7. Do you fully understand everything I have just read to you????

DATE:_____ REP:_____
MANAGER:_____

The first of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The first of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured.

The second of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured. The second of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured.

The third of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The third of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured.

The fourth of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured. The fourth of the year was a very wet one, and the crops were much injured. The weather was very cold, and the crops were much injured.

The fifth of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured. The fifth of the year was a very dry one, and the crops were much injured. The weather was very hot, and the crops were much injured.

McCann claimed he ordered the "this is not a sales call" line dropped, McCann had said in a deposition that he saw nothing wrong with the line. Salespersons were given canned responses to recurring customer questions. For example, salespersons were directed to respond to customer reluctance about giving out credit card numbers over the phone by stating that "... we contact MC/VISA to varify [sic] your credit. . . . If we misused any credit card number, not only would we lose that merchant number but no doubt, our bank would freeze our account for a complete audit of all business on MC/VISA." Some scripts also failed to make clear that the customer, by giving the salesperson a credit card number, would be charged for the voucher.

B. "At that price, I'm sure you'd like to go"

The defendants were quite successful at marketing their vacation vouchers. Defendants claim that approximately 35,000 certificates were sold wholesale to other companies and 25,000 were sold directly to consumers. Twelve thousand to 13,000 trips were taken by 25,000 people and some 17,000 customers were waiting for trips when the operation was shut down by the FTC. Gross revenues were around \$1.5 million in 1986 and \$4.5 million in 1987.

Consumer complaints about the defendants resulted from a number of the defendants' practices. Many consumers complained that the defendants misused their credit card numbers. A number of witnesses testified that when contacted by the salesperson, they were not told that they would be charged for a purchase—the witnesses claim the salesperson asked for a credit card number for the sole purpose of verifying the customer's credit worthiness.

Defendants ran into other troubles with banks handling defendants' credit card transactions. The difficulties arose because of the high number of consumers who disputed the charges made to their accounts by the defendants. These disputes resulted in chargebacks to the defendants' accounts when consumers refused to pay. The magistrate took note of one bank that eventually suffered over \$700,000

in consumer chargebacks. A number of banks terminated defendants' accounts due to consumer complaints.

The main consumer complaint about the defendants' pitch was a misunderstanding about the true cost of the vacation package. The vacation passport itself was sold for \$289 to \$329. Printed on the passport was an explanation of the passport's worth—the bearer was entitled to two round trip airplane tickets and lodging for eight days and seven nights for a price "not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare." Defendants could therefore charge consumers any amount up to the cost of a Y-class airfare in addition to the cost of the passport itself. The magistrate determined that "the use of the word 'economy' suggested a low cost fare." *FTC v. Amy Travel*, No. 87 C 6776, slip op. at 27 (N.D. Ill. Feb. 10, 1987). The Y-class airfare, although described as a "full-economy" fare, is actually the highest-priced coach fare available. This was never disclosed to the purchasers of the vacation passports and the magistrate found this was deceptive. Only after a prospective traveler had booked a vacation was the true price disclosed.

The magistrate also found that the wording of the telemarketing scripts created the misleading impression that the cost of the vacation passport equaled the price of the entire vacation package. The magistrate noted that

the script opened with the strong implication that the price was "only \$329.90," reinforced by the false statement that the person was one of a select group of preferred credit card holders and the remark, "At that price, I'm sure you'd like to go . . ."

FTC v. Amy Travel, No. 87 C 6776, slip op. at 26 (N.D. Ill. Feb. 10, 1987).

Finally, the magistrate determined that, upon hearing the script promise that for the stated price, the consumer would receive a voucher entitling purchaser to a vacation package "for a cost not to exceed (1) unrestricted economy airfare," a reasonable consumer listening over the phone would likely believe that the cost of the vacation passport was equivalent to one unrestricted economy airfare. *Id.*



The actual prices of the vacation packages far exceeded the cost of the vacation passport itself, and un rebutted evidence showed that the prices charged by Amy were not bargains. In her findings of fact, the magistrate took note of an example presented by the FTC of a vacation trip from Washington, D.C. to Honolulu. According to the affidavit, on April 28, 1987 the round trip Y-class airfare from Washington to Honolulu was \$1,936 while a full vacation package for two to Waikiki including accommodations for seven nights and airfare was available from another travel agent for \$1,198. The magistrate found that, in light of such facts, the vacation passport was of little actual value; since the sales pitch had created the impression that the vacation passport was a great bargain, the magistrate determined that it was deceptive. The magistrate also found that Weiland and McCann were personally responsible for the management of the operations.

C. The Proceedings Below

In response to numerous consumer complaints about the defendants' operations, the attorneys general of a number of states, as well as the FTC, acted against the defendants.⁴ On August 3, 1987 the FTC filed its complaint, pursuant to section 13(b) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 53(b), claiming the defendants violated section 5 of the FTCA, 15 U.S.C. § 45. The FTC sought preliminary and permanent injunctive relief, an asset freeze, rescission, restitution, and other equitable relief. In its complaint, the FTC alleged that the defendants had engaged in unfair and deceptive marketing practices by misrepresenting and deceptively failing to disclose the true cost of the vacations they sold and misrepresenting their billing practices, including billing customers without authorization.

A temporary restraining order ("TRO") and an order to show cause why a preliminary injunction should not issue

⁴ Judgment decrees were entered against the defendants in Texas, Indiana, Illinois, and Kentucky.



were also entered on August 3. The temporary restraining order froze defendants' assets, except as necessary to pay off obligations to customers, and required that defendants (1) cease any practices alleged to be deceptive and (2) account for all sales, cancellations, refunds, and vacations having to do with vacation passports. The order was later modified to allow for the payment of reasonable living expenses and reasonable attorneys' fees.⁵

After a number of delays and difficulties that eventually resulted in Rule 11 sanctions being levied against defendants' counsel,⁶ trial was held before the magistrate between December 10 and December 16, 1987. The FTC presented several consumers, employees, and an expert as witnesses. Defendants objected to the exclusion of some evidence they attempted to present, including postcards sent to Amy by customers during their trips. The magistrate found that, since the FTC had already stipulated that some customers had taken trips, there was no need for further evidence proving this fact. The magistrate also excluded as irrelevant a witness who had purchased a vacation passport from someone other than the defendants and another witness who had received a passport as a premium for attending a sales presentation.

The magistrate concluded that the defendants had committed deceptive acts in commerce, made representations and omissions, acted in a manner likely to mislead, and actually misled reasonable consumers. The magistrate also found that the misrepresentations, practices, and omissions of defendants were material to the transaction. The magistrate entered a final order of permanent injunction on

⁵ The orders for attorneys' fees were entered under seal. The amount of fees paid is between \$50,000 and \$70,000, though the actual amount will not be specified.

⁶ Counsel for defense was sanctioned by the trial court under Fed. R. Civ. P. 11 and this sanction has also been appealed, *FTC v. Amy Travel*, No. 88-2328. That appeal was consolidated with this one for oral argument, but it will be addressed separately by this court.



May 4, 1988, finding that the FTC had established a violation of the FTCA. The defendants, jointly and severally, were ordered to pay \$6,629,100 to the FTC in redress. Enforcement of that order was stayed pending this appeal.

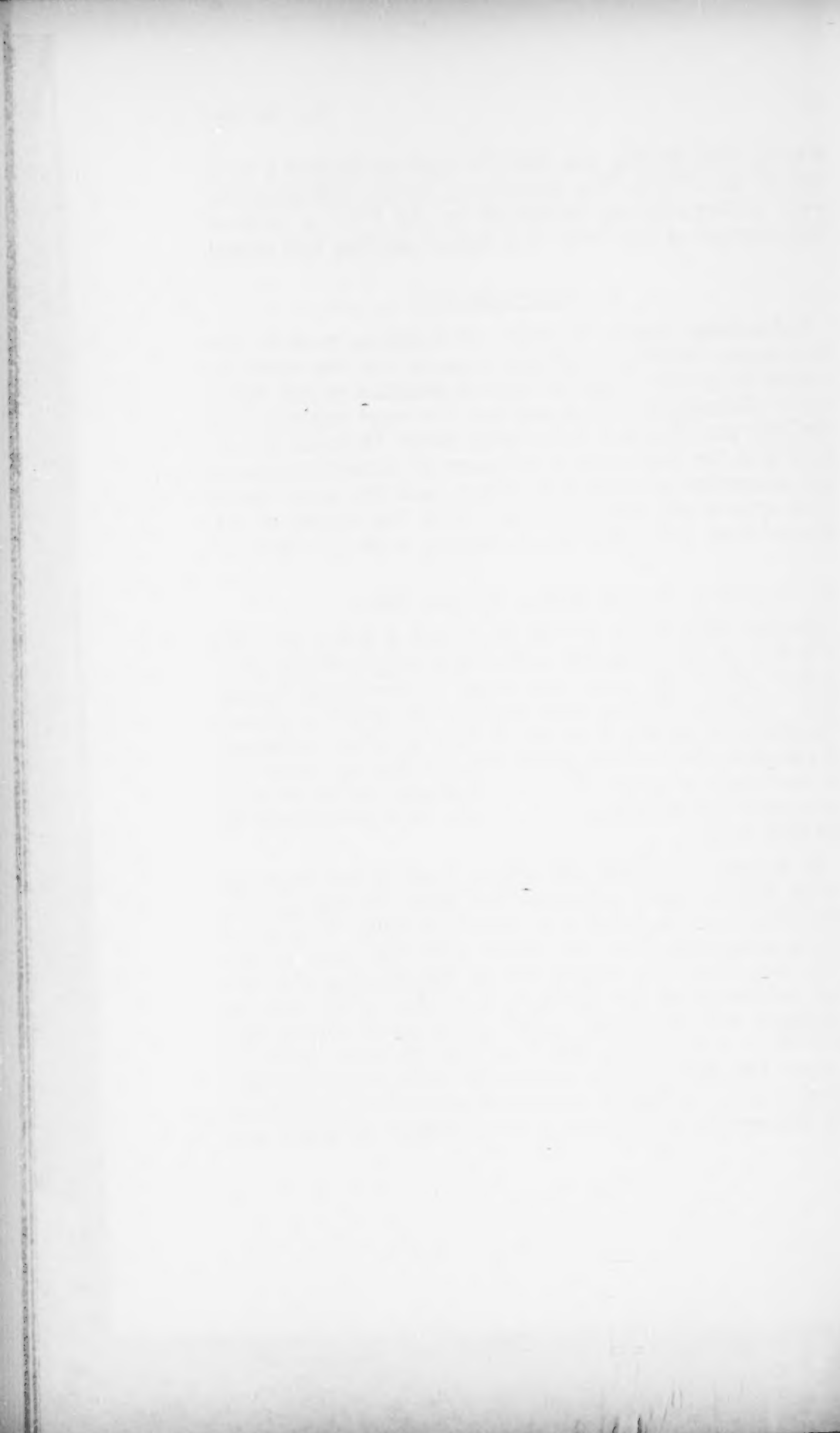
II. DISCUSSION

Defendants dispute a number of decisions made by the trial court. Defendants initially contend that the court exceeded its powers when it imposed penalties on the defendants. Defendants also argue that the court unjustly held McCann and Weiland individually liable. Defendants contend that the magistrate's exclusion of certain testimony, the admission of some depositions, and the asset freeze were errors, and defendants also claim the magistrate exhibited bias and prejudice in dealing with this case.

A. Equitable Powers Under Section 13(b)

Section 13(b) of the FTCA, 15 U.S.C. § 53(b), provides "[t]hat in proper cases the Commission may seek and after proper proof, the court may issue, a permanent injunction." Section 13(b) is often used by the FTC to pursue violations of section 5 of the FTCA or other violations of statutes. Defendants assert that the district court has no authority to grant monetary equitable relief, such as rescission and restitution, in a section 13(b) permanent injunction action.

In making this claim, defendants point to the language of the statute itself and argue that since the statute only specifies that the court shall have authority to grant a permanent injunction, the court's authority goes no farther than that. The magistrate, in determining that she had authority to use ancillary equitable relief such as rescission and restitution, relied on the Ninth Circuit case of *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982). In *Singer*, the Ninth Circuit found that because section 13(b) gives a court authority to grant a permanent injunction, the statute by implication gives authority "to grant any



ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Singer*, 668 F.2d at 1113. Defendants argue that *Singer* should not be adopted by this court, claiming that the clear language of the statute should point the way to refusing to give the district court ancillary equitable powers.

Defendants' efforts to curtail the power of the district court in this case have been thwarted by some recent decisions of this court that make clear the breadth of the equitable authority granted by section 13(b). In *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), this court adopted the Ninth Circuit's position in *Singer* that the granting of permanent injunctive power "also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *World Travel*, 861 F.2d at 1026 (quoting *Singer*, 668 F.2d at 1113). In *World Travel*, this court held that the district court had the authority under section 13(b) to grant interlocutory relief as well as permanent injunctive relief. *Id.* In *FTC v. Elders Grain, Inc.*, Nos. 88-2493 & 88-2494, slip op. (7th Cir. Jan. 30, 1989), this court specifically found that a district court could order rescission in a section 13(b) proceeding. In *Elders*, we dealt with whether the section 13(b) grant of preliminary injunctive authority carried with it a grant of other equitable powers. We found that such a granting of power "carries with it the power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power." *Id.* at 11.

This reasoning applies with equal force to the issue of whether the granting of permanent injunctive powers also carries with it the power to invoke ancillary equitable relief. Rescission and restitution are proper forms of ancillary relief. All other circuits that have dealt with this issue have found that section 13(b) grants the authority to issue other necessary equitable relief. *See, e.g., FTC v.*



United States Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984) (district court has full equitable powers incident to express authority to issue permanent injunction under section 13); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (permanent injunctive power also gives authority for ancillary equitable relief); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982) (grant of jurisdiction in section 13(b) includes authorization for district court to exercise full range of equitable remedies traditionally available). Defendants' reliance on this court's opinion in *JS & A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983), is misplaced. *JS & A Group* did not address the question of whether the provision allowing the district court to enter a permanent injunction also permitted ancillary equitable relief—that case only dealt with whether the FTC must begin cease-and-desist proceedings prior to obtaining a section 13(b) permanent injunction. *World Travel*, 861 F.2d at 1026. We hold that in a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers.

B. Exclusion of Evidence

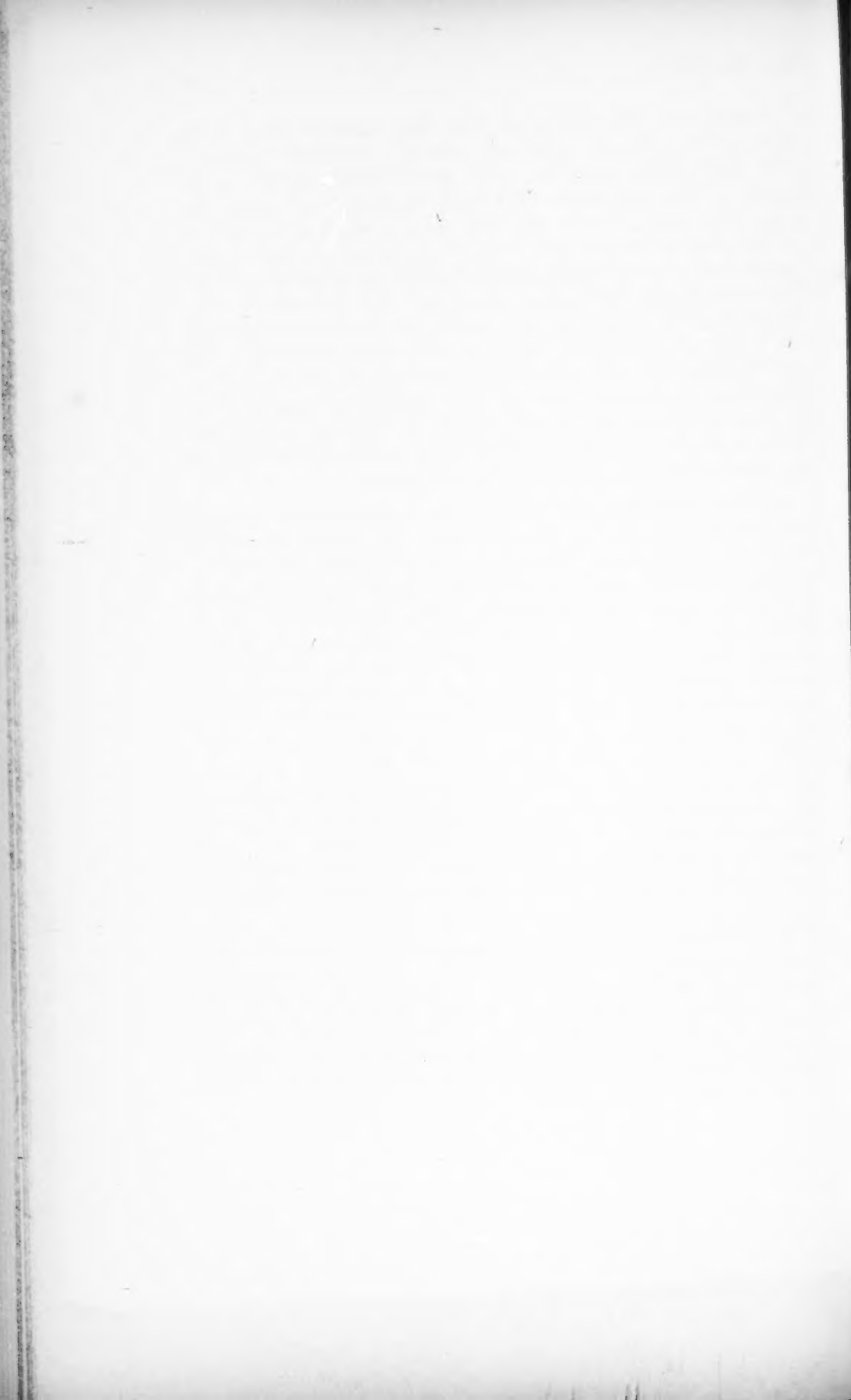
Defendants next claim that the magistrate erred in excluding certain evidence during the trial for lack of relevancy and other reasons. The trial court excluded some testimony by "satisfied customers" of Amy, excluded certain expert witness testimony, and excluded testimony concerning advice given by counsel to defendants concerning their operation. The trial court has substantial discretion in making these types of evidentiary rulings and we must give the magistrate great deference. This court will not overturn these evidentiary decisions in the absence of a clear abuse of discretion. *Charles v. Daley*, 749 F.2d 452, 463 (7th Cir. 1984), *appeal dismissed sub nom. Diamond v. Charles*, 476 U.S. 54 (1986).



Defendants first contend that they should have been allowed to present testimony from customers satisfied with their vacations. The trial court excluded the testimony of two witnesses who took vacations arranged by Amy. The court found that the sales presentations given to the two witnesses were not made by any of the defendants, but were attributable to independent third parties. The magistrate reasonably concluded that the use of Amy to arrange the trips did not make the testimony relevant since the complaints at issue in this case concerned the representations and omissions made by the defendants in connection with the sale of the vacation packages. Performance of the travel obligations or any failure to perform was not at issue and the trial court did not abuse its discretion in excluding the testimony.

Similar reasoning was used by the magistrate to exclude postcards and letters sent to Amy by customers while on their vacations. Defendants argue that unsolicited postcards from satisfied customers show that customers were not deceived. Defendants misunderstand the proof that must be offered by the FTC. Contrary to defendants' claims, the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense under the FTCA. *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960); *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir.), *cert. denied*, 362 U.S. 940 (1960). The magistrate correctly acknowledged the existence of satisfied customers in computing the amount of defendants' liability—customers who actually took vacation trips were excluded when the magistrate computed the amount of restitution awarded.⁷

⁷ It was unclear how many customers who actually took trips were dissatisfied with their vacations. The difficulties involved in determining how much relief should be given to dissatisfied customers prompted the magistrate to limit the relief to those customers who received nothing of value for the price of the vacation passport. Customers, satisfied or unsatisfied, who took trips were excluded from the computation of relief and that decision is not at issue on this appeal.

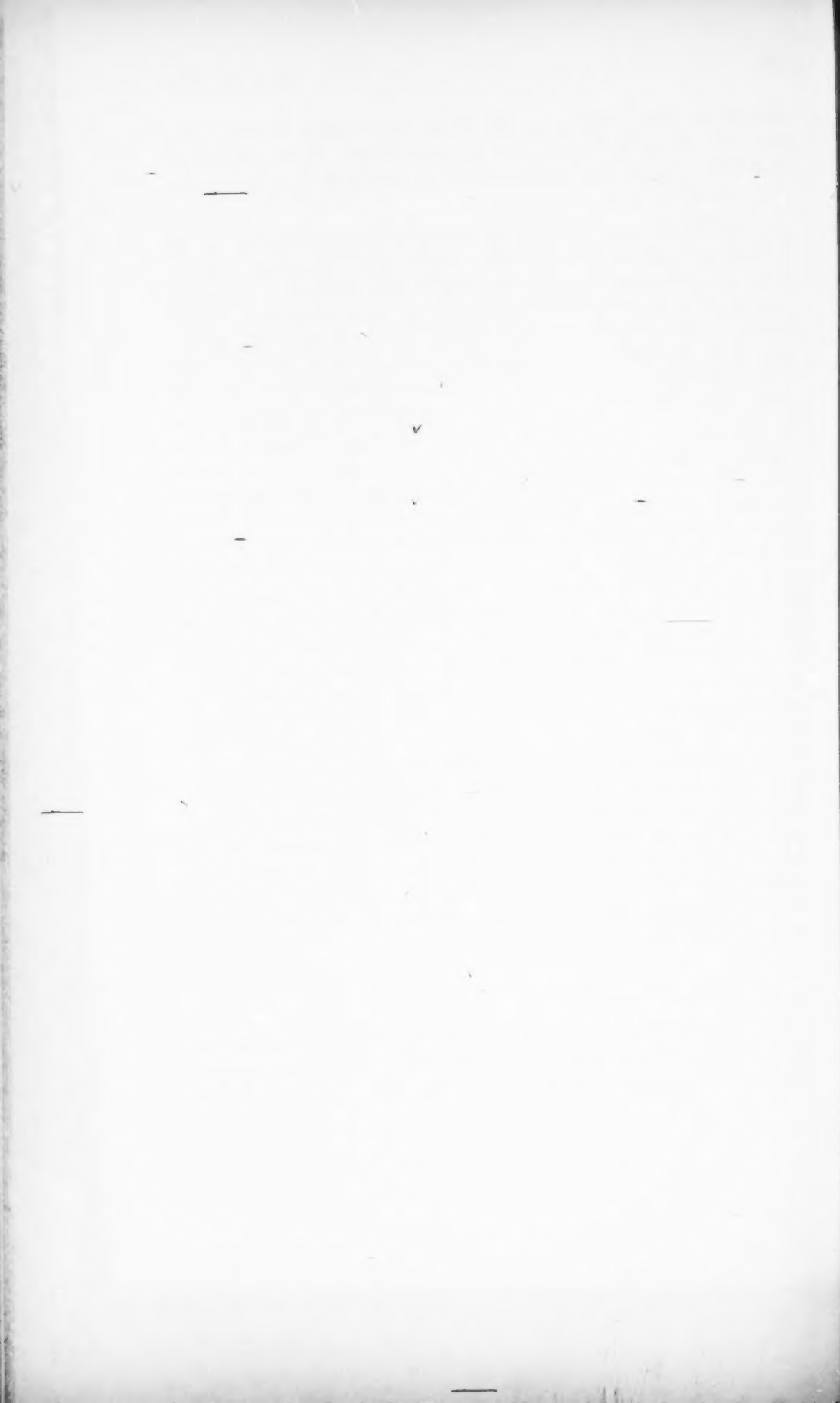


However, the existence of those customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude the postcards and letters.

Defendants also criticized the trial court's exclusion of certain expert testimony. The trial court "has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108 (1974); see also *Spesco v. General Elec. Co.*, 719 F.2d 233, 238 (7th Cir. 1983); *Grindstaff v. Coleman*, 681 F.2d 740, 743 (11th Cir. 1982). Steve Frenzl was offered by defendants as an expert in travel marketing. During Frenzl's testimony, defense counsel asked whether defendants' sales practices were "deceptive or misleading." The magistrate properly prevented Frenzl from answering since the question called for Frenzl to render a legal opinion. Mr. Frenzl was also prevented from commenting on consumer perception of the sales pitch. The magistrate determined that Frenzl did not possess the necessary expertise to give his opinion on this issue. See Fed. R. Evid. 104(a), 702. The court found that testimony on how consumers would react to sales material should be given by an expert in consumer psychology or consumer behavior. The magistrate did not abuse her discretion in making this determination. The magistrate also correctly excluded testimony from a travel law expert on other advertising methods used by travel companies and refused to allow one of defendants' employees to give his opinion on whether the defendants' methods were deceptive or unfair. The issue of the magistrate's exclusion of certain evidence relating to advice of counsel is premised on the individual liability of the defendants and will be dealt with separately.

C. Individual Liability

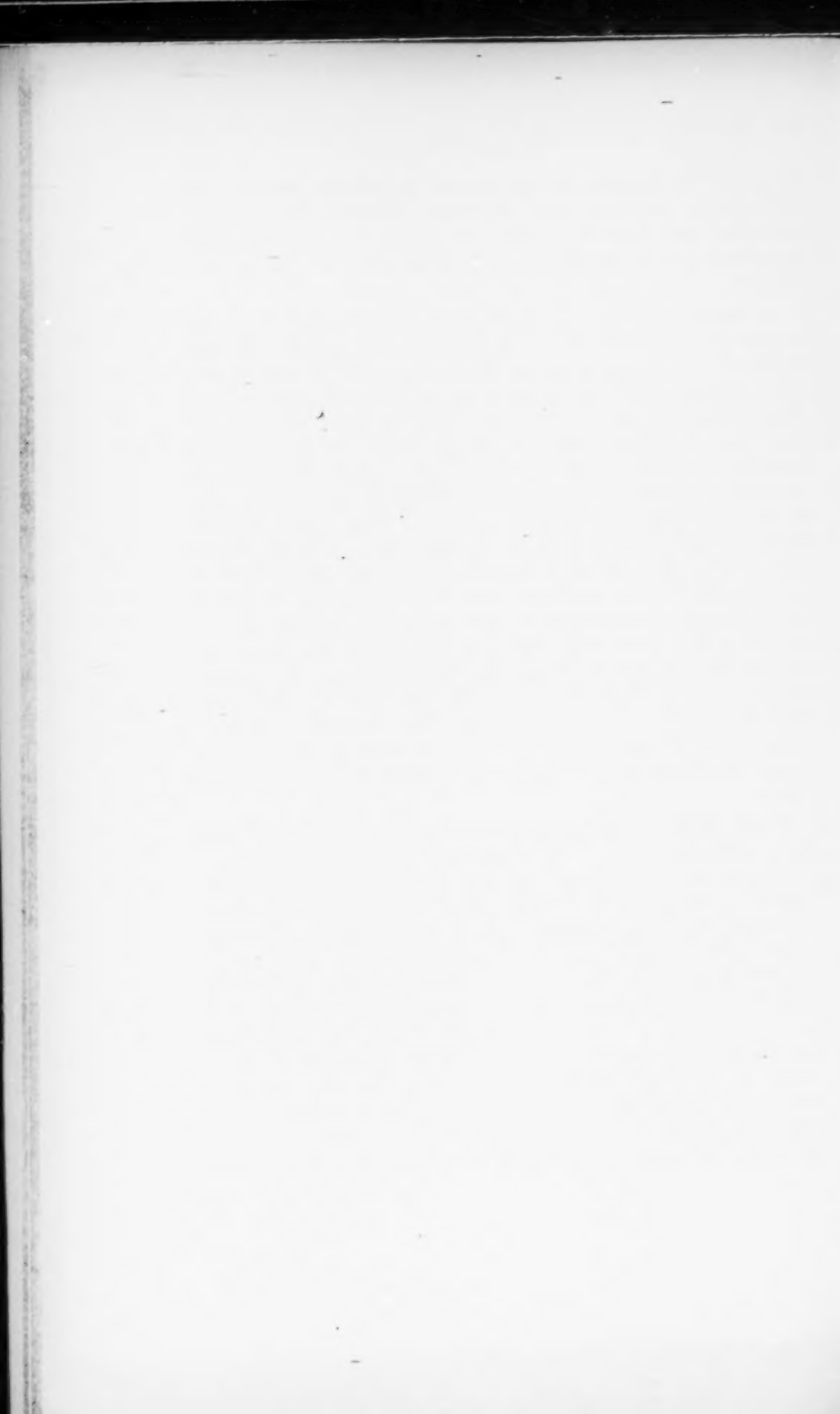
Defendants now challenge the decision of the magistrate to hold all of them jointly and severally liable for restitution to consumers. Defendants claim that the FTC failed



to meet its burden for imposing individual liability on defendants McCann and Weiland. Defendants also argue that the magistrate did not apply the correct legal standard for determining individual liability under the FTCA.

An individual may be held liable under the FTCA for corporate practices if the FTC first can prove the corporate practices were misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted. *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985). Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. *Kitco*, 612 F. Supp. at 1292; *FTC v. H.N. Singer, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,011 at 70,618-19 (N.D. Cal. 1982). Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *Kitco*, 612 F. Supp. at 1292; see e.g., *Consumer Sales Corp. v. FTC*, 198 F.2d 404, 408 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953). The FTC must then demonstrate that the individual had some knowledge of the practices. The knowledge requirement is the key issue in this case.

While acknowledging that intent per se is not a necessary element in an FTC violation, see *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir. 1976), cert. denied, 429 U.S. 1093 (1977) (When unfair trade practices occur, "liability for civil penalties arises without a need for any showing that the practices were intentional or malicious."); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 308-09 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963), the defendants are asking this court to apply a higher standard of knowledge in cases where individuals could be held liable for monetary restitution. Defendants correctly point out that the cases cited for the proposition that intent to deceive is not a necessary element of an FTC violation all dealt



with cease-and-desist orders or injunctions. In such cases, corporations and individuals are being directed to refrain from certain conduct. This case involves holding an individual liable for monetary restitution and defendants argue that it would be better to find bad faith before imposing such a sanction. See *Porter & Dietsch*, 605 F.2d at 309 (extent of party's culpability should affect nature of relief granted). Some district courts in other circuits have held that to find an individual liable for restitution under section 13(b), the FTC must prove that the defendant knew or should have known that the conduct was dishonest or fraudulent. See *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,706-07 (N.D. Cal. 1983) (to hold defendant liable for redress under section 13(b), defendant's activity must rise to the level of fraud or dishonesty); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985) (to obtain monetary equivalent of rescission, FTC must prove defendant had knowledge that corporation or its agents "engaged in dishonest or fraudulent conduct"); *FTC v. Atlantex Assoc.*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,255 (S.D. Fla. 1987).

We find that imposing a requirement that the FTC prove subjective intent to defraud on the part of the defendants would be inconsistent with the policies behind the FTCA and place too great a burden on the FTC. The FTC is required to establish the defendants had or should have had knowledge or awareness of the misrepresentations, *Kitco*, 612 F. Supp. at 1292, but that knowledge requirement may be fulfilled by showing that the individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Kitco*, 612 F. Supp. at 1292; see also *International Diamond*, 1983-2 Trade Cas. (CCH) at 69,707. Also, the degree of participation in business affairs is probative of knowledge. *International Diamond*, 1983-2 Trade Cas. (CCH) at 69,707-08.



In analyzing the facts of this case under this standard, the magistrate noted that behind the power to hold individuals liable for corporate actions is a belief that "one may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices." *FTC v. Amy Travel*, No. 87 C 6776, slip op. at 32 (N.D. Ill. Feb. 10, 1987). With this policy in mind, the magistrate determined that the FTC had met its burden. The magistrate found that

[a]lthough it appears that McCann and Weiland themselves did not make sales calls to consumers, the level of admitted participation by McCann and Weiland in the business more than adequately supports a finding that these individuals had knowledge of the practices at issue. McCann and Weiland designed and on a day-to-day basis oversaw the sales operation with the clear purpose of inducing consumer purchases of their vacation passports. Having written the deceptive scripts, McCann and Weiland certainly knew of the material misrepresentations and omissions upon which the scripts were based. They were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the use of the scripts and from the embellishing misrepresentations employed by the telemarketers in deviation from the scripts. Second, by their own admissions, as principal shareholders and officers of the closely held defendant corporations, McCann and Weiland admittedly had authority to control the deceptive sales operation and all other aspects of their business.

FTC v. Amy Travel, No. 87 C 6776, slip op. at 32.

These factual findings made by the trial court must be analyzed under the clearly erroneous standard. Fed. R. Civ. P. 52(a). See *In re Muller*, 851 F.2d 916, 920 (7th Cir. 1988) ("Only if we are 'left with the definite and firm conviction that a mistake has been committed,' may we disturb the court's findings.") (citing *Anderson v. Bessemer*, 470 U.S. 564, 573 (1985)). It is clear that McCann



and Weiland were the ones behind the vacation passport scheme. They were the principal shareholders and officers of the corporations. They created the businesses, opened new ones, wrote telemarketing scripts, and hired personnel. They controlled the financial affairs of the companies and reviewed the sales reports and other information. McCann oversaw the daily sales operation and consulted with Weiland regularly. As authors of the sales scripts, they were certainly aware of the misrepresentations contained in them. If they were unable to see trouble coming by looking at the scripts, it is unlikely they missed the signals sent by the high volume of consumer complaints and the excessive credit card chargebacks.

Defendants offer another defense to this conclusion. They contend that, contrary to appearances, they did not intend to create a fraudulent scheme and they offered evidence to show that they took pains to avoid tangling with the law. The magistrate took note of some efforts by defendants to discourage deviations from approved scripts and clear up problems with credit card charges, but found they were grossly inadequate and did little to stem the tide of consumer dissatisfaction. The defendants offered other justifications for their actions. For instance, Weiland claimed that salespeople withheld the actual price of the vacation package from consumers because the future price of the airline ticket was unavailable at the time of sale. The magistrate discounted this claim, stating that it would have been easy to give the customer a reasonable estimate of the cost and concluding that the salespeople withheld the actual price to raise consumer expectations about the value of the vacation passport. The magistrate found that whatever efforts Weiland and McCann claim to have made were ineffective as shown by the high volume of consumer complaints and credit card chargebacks.

Defendants strongly argue that their efforts to gain approval from counsel for their activities demonstrate they did not have the necessary knowledge that they were engaging in deceptive practices. Defendants had attorneys review their script and office policies to make certain they



were within the boundaries of the law.⁸ The magistrate correctly found that the blessing of an attorney did not make the telemarketing scripts truthful. Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices. The magistrate was satisfied that the FTC had proven that defendants had sufficient knowledge to find them individually liable. The court determined that reliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the defendants should have known was wrong. The defendants wrote or reviewed many of the scripts that were found to be deceptive and they were undoubtedly aware of the avalanche of consumer complaints. The trial court's conclusion that McCann and Weiland had the necessary knowledge and control to be held individually liable was not clearly erroneous.⁹

D. The Freeze on Assets

Defendants now contend that the freeze on assets by the TRO and the subsequent permanent injunction prevented them from paying attorneys' fees. They argue that such a freeze violates defendants' constitutional rights by

⁸ Defendants claim the trial court excluded important evidence relating to advice of counsel. An examination of the record and the trial court's opinion shows that the magistrate was sufficiently aware of defendants' efforts to get counsel's approval of corporate practices. The magistrate's exclusion of certain testimony relating to advice of counsel on the basis of relevancy was not clearly erroneous. *Charles v. Daley*, 749 F.2d 452, 463 (7th Cir. 1984).

⁹ At oral argument, defendants raised a new issue concerning the assessment of individual liability. Defendants argued that it was inappropriate to impose the entire amount of restitution on the individual defendants. The basis for this argument was unclear since it was not raised by the parties in the briefs. We find no merit in this argument and affirm the decision of the trial court to assess all defendants for the full amount of restitution.



restricting their choices in obtaining representation. See *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); see also *Caplin & Drysdale v. United States*, 837 F.2d 637 (4th Cir.) (en banc), cert. granted, 109 S. Ct. 363, 102 L. Ed. 2d 352 (1988); but see *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.), cert. granted, 109 S. Ct. 363, 102 L. Ed. 2d 353 (1988). While the issue of whether an asset freeze violates constitutional rights to counsel or due process is interesting, it is unnecessary for this court to reach the question. The trial court modified the asset freeze to allow for reasonable attorneys' fees and expenses. Counsel received between \$50,000 and \$70,000 for his time and effort.¹⁰ The defendants have given us insufficient reason to alter the amount of fees awarded. The magistrate was in the best position to determine what constituted a reasonable fee in this case and we will not disturb her decision. See *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031-32 (7th Cir. 1988).

E. Admission of Consumer Affidavits

Defendants dispute the trial court's decision to admit a number of consumer affidavits. On a motion *in limine*, the FTC introduced a number of affidavits from consumers who purchased travel vouchers from the defendants.¹¹ The affidavits were admitted to show actual consumer harm had resulted from the defendants' activities. The trial

¹⁰ The actual amount of attorneys' fees awarded cannot be specified since the orders awarding the fees were entered under seal. Counsel for defendants did state at oral argument that the amount was closer to \$70,000 than to \$50,000.

¹¹ Defendants also contest the admission of a large number of consumer complaint letters. These letters were admitted for the limited purpose of showing that defendants were on notice of potential problems with their operations. The letters were not admitted for the truth of their statements and they pose no hearsay problems. Fed. R. Evid. 404(b).



court ruled that the affidavits fell within the residual exception to the hearsay rule. Fed. R. Evid. 803(24).¹²

In determining the correctness of the trial court's admission of evidence under the residual exception, we must give the trial court "a considerable measure of discretion." *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979). Hearsay offered under Rule 803(24) must satisfy five criteria to be admissible: the statement must be sufficiently trustworthy, material, probative, in the interests of justice, and given to opposing parties with the proper notice. *Id.* at 292-95. Turning to these requirements, it is clear that these affidavits will fall within the residual exception and the trial court did not abuse its discretion by admitting them. The affidavits possess sufficient guarantees of trustworthiness; each was made under oath subject to perjury penalties and the affiants describe facts about which they have personal knowledge—their contacts with defendants. The evidence is important to the issue of whether there was actual consumer injury from defendant's action and the affidavits would be probative of that fact. The interests of justice are served by allowing the affiants to submit affidavits instead of requiring their appearance in court. The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony. See *Kitco*, 612 F. Supp. at 1294 (too expensive and time consuming to get witnesses from all over

¹² The FTC claims a separate ground for admitting the affidavits. Apparently, the FTC had made a request to defendants for admissions in the subject matter of the affidavits. In the opinion of the trial court, defendants responded improperly to the request. The trial court directed defense counsel to reevaluate the response to the requests for admission. Defense counsel did not review his responses and the court then admitted all matters that the FTC had requested, including the contested affidavits. The admission of these affidavits cannot be sustained upon that ground alone. The affidavits must fall within a hearsay exception to be admitted properly.

country; affidavits serve interests of justice). Defendants were also given proper notice of the affidavits—they even had the chance to question the affiants themselves, but they chose not to avail themselves of the opportunities. The trial court's decision to admit these affidavits was not an abuse of discretion.¹³ However, even if this evidence did not fall within the residual exception, we would also find that the admission of this evidence was not prejudicial to the defendants. Other evidence in the record adequately established that there was actual harm to consumers. The evidence presented in the affidavits was cumulative and had little effect on the determination of actual harm.

III. CONCLUSION

For the forgoing reasons, the decision of the trial court is AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

¹³ Defendants also claimed that the trial court exhibited sufficient bias and prejudice to require reversal. We find no merit to this argument. Friction between court and counsel does not constitute bias. *Hamm v. Board of Regents*, 708 F.2d 647, 651 (11th Cir. 1983).



EXHIBIT 4



§ 53. False advertising; injunction; grounds

(a) Power of commission; jurisdiction of courts. Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12 [15 USCS § 52], and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5 [15 USCS §45], and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5 [15 USCS § 45], would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted



without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Temporary restraining orders; preliminary injunctions. Whenever the Commission has reason to believe

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed

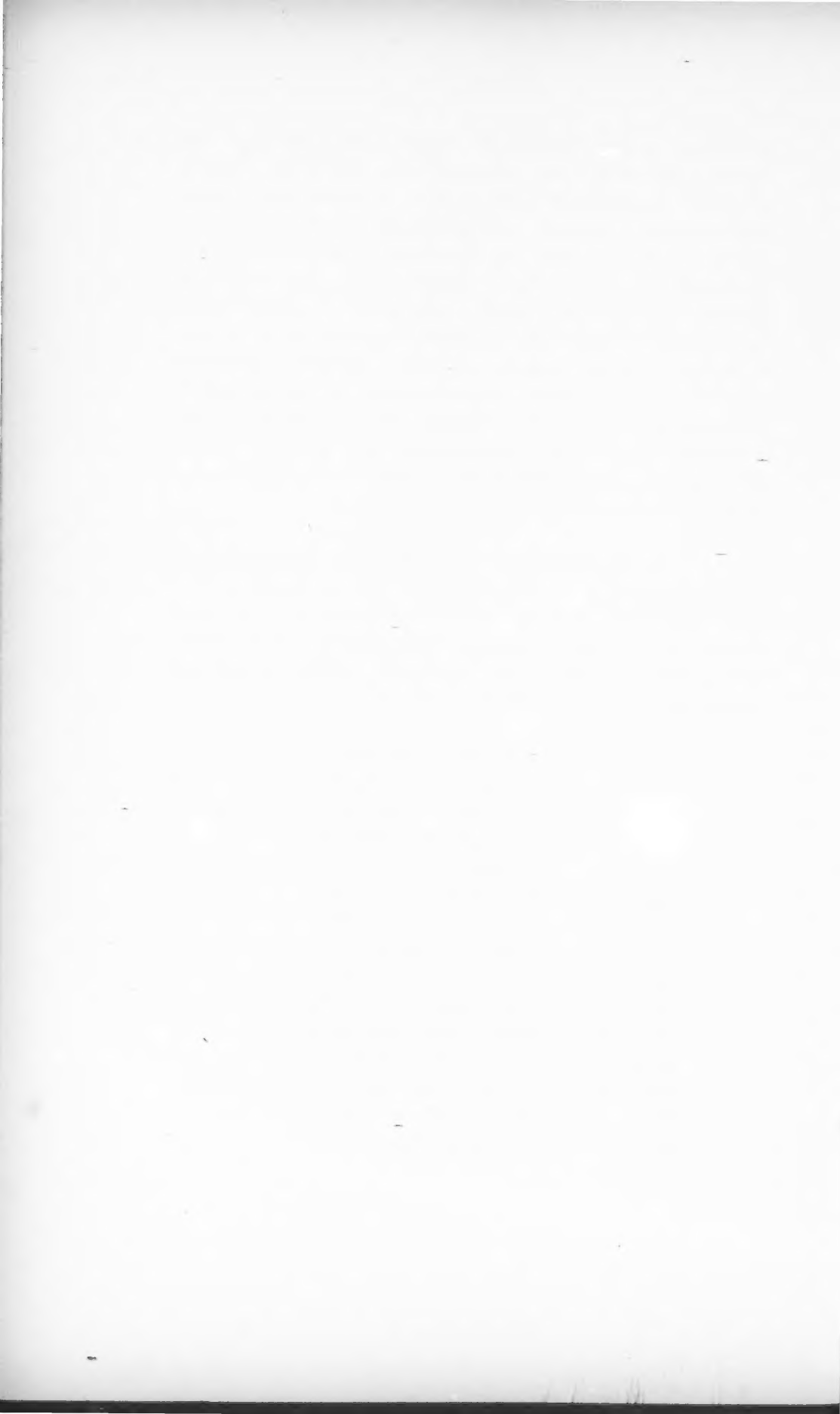


within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(c) Exception of periodical publications. Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals--

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an



injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order of injunction.

(Sept. 26, 1914, c. 311 § 13, as added Mar. 21, 1938, c. 49 § 4, 52 Stat. 115; Nov. 16, 1973, P. L. 93-153, Title IV, § 403(f), 87 Stat. 592)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1973. Act Nov. 16, 1973 (effective 11/16/73), Sec. 408(f) redesignated former subsec. (b) to be subsec. (c), and inserted new subsec. (b).



EXHIBIT 5



§ 57b. Consumer redress

(a) Civil actions by Commission for violations of rules and final cease and desist orders.

(1) If any person, partnership, or corporation violates any rule under this Act [15 USCS §§ 41 et seq.] respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a) [15 USCS § 45(a)]), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1) [15 USCS § 45(a)]) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of



a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Relief. The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnership, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Findings of Commission as conclusive in civil action; notice of action to injured parties.

(1) If (A) a cease and desist order issued under section 5(b) [15 USCS § 45(b)] has become final under section 5(g) [15 USCS § 45(g)] with respect to any person's, partnership's, or



corporation's rule violation or unfair or deceptive act or practice, and (b) an action under this section is brought with respect to such person's partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) [15 USCS § 45(b)] with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's finding shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1) [15 USCS § 45(g) (1)], in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.



(d) Limitations. No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) [15 USCS § 45(b)] which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Supplemental remedies; additional authority of Commission. Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

(Sept. 26, 1914, c. 311, § 19, as added Jan. 4, 1975, P. L. 93-637, Title II, § 206(a), 88 Stat. 2201.)



CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Appendix was served via U. S. Mail to Mr. Melvin Orleans and Mr. Larry Hodapp, Attorneys at Law, Federal Trade Commission, 6th and Penn. Avenue, N.W., Washington, D.C. 20580 and the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 05th day of August, 1989.


Robert S. Bennett